No. 247.
Brf. of Robinson for Pltf.
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Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 247.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

WILLIAM HOWARD AND LAURA P. HOWARD, HIS WIFE.

BRIEF IN BEHALF OF PLAINTIFF IN ERROR.

LEIGH ROBINSON,
For Plaintiff in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 3-19-1900

IN THE

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vs.

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Brief in Behalf of Plaintiff in Error.

STATEMENT.

In the original declaration in this cause the plaintiffs sued the defendant, The Chesapeake and Ohio Railway Company, as a foreign corporation doing business in the District of Columbia, for that the defendant, "on the 16th day of November, 1886, was running and operating a line of railway between *the cities of Louisville, in the State of Kentucky, and Washington, in the District of Columbia*," and on said date, "*agreed and contracted with the said Laura P. Howard to safely carry and transport her over their said line of railway from*

the said city of Louisville to the said city of Washington." It is then alleged that by reason of the carelessness of the *defendant's agents* in charge of the said train the plaintiff was injured to the extent of the damages laid in the declaration (Rec., pp. 1 and 2). Service of this declaration was made on C. H. Chapin the 14th day of November, 1887 (*id.*, p. 3).

On the 6th of December, 1887, the defendant filed a plea to the jurisdiction of the court, stating that it was a foreign corporation, incorporated in the States of Virginia and West Virginia, *not at the time doing business in the District of Columbia, having no agent therein, and more specifically that C. H. Chapin was not such agent;* that by decrees of the courts of Henrico and Kanawha counties, in the incorporating States, on the 27th and 28th days of October, 1887, the property of said defendant had been placed in the hands of a receiver of said courts, and that since the passing thereof said receiver had control of *and had operated the said property as such receiver*, and that said C. H. Chapin was the agent of said receiver. No notice was taken of this plea by the plaintiff *for more than two years*, and on January 4, 1890, the defendant filed a motion to dismiss the suit for want of prosecution. The answer to this motion was an order of court striking the defendant's plea from the file, entering judgment by default, and directing a jury of inquest to be summoned (*id.*, pp. 3 and 4). In a written opinion the court assigned as a ground for this ruling that the plea to the jurisdiction was unverified. On February 4, 1890, the defendant (not waiving its plea to the jurisdiction heretofore made), by leave of court, tendered for filing pleas, denying, in the exact words of the declaration, each and every fact alleged therein, which defense was verified by the oath of defendant's attorney.

On February 15, 1890, an order was entered: "Default set aside; leave to defendant to plead general issue." On February 17 the defendant filed the general issue in *assumpsit* (*id.*, p. 5). On May 13, over the objection of defendant's

counsel, leave was granted to plaintiff to amend the declaration, and pursuant thereto, on the same day, an amended declaration was filed. The gravamen of the amended declaration is that on the 18th (?) of November, 1886, and for a long time prior thereto, the defendant was operating a line of railway *between the cities of Louisville, in the State of Kentucky, and Washington city, in the District of Columbia, and upon said line of railway was a common carrier of passengers for hire*, and on said date "the said Laura P. Howard purchased *from the agent of the defendant, at the said city of Louisville*, a ticket entitling her to a passage from the said city of Louisville to the said city of Washington, and the defendant *thereby became bound to safely carry and transport* the said Laura P. Howard from the said city of Louisville to the said city of Washington, and on the day and year aforesaid, at the said city of Louisville, the said Laura P. Howard took passage *upon one of the defendant's passenger trains for the city of Washington*," but that "at or near the town of Soldier, in the State of Kentucky, by the unskillfulness, &c., of the *defendant's agents in charge of the said train*," the plaintiff was badly injured, by reason whereof she has lost her place as clerk in the office of the Agricultural Bureau and the income thereof, "*which, by the consent and agreement of her husband, she was entitled to have and enjoy for her own personal benefit*" (*id.*, p. 6). It will be observed that the amended declaration is for the common carrier's breach of duty to the public, and not, like the original declaration, for breach of contract with the plaintiff. The defendant, "not waiving its rights under former pleas, but insisting thereon and excepting to the ruling of the court allowing the filing of the amended declaration, pleaded, 1st (instead of the general issue *non-assumpsit*), the general issue not guilty, and, 2d (on the ground that the amended declaration, sounding, as it did, in tort and not in contract, was for a different cause of action), the statute of limitations; and, 3d, that on or

about the 24th day of November, 1886, there was accepted by said plaintiff the sum of $200 "in full satisfaction and discharge of the claim for said supposed grievances" (*id.*, p. 7), which acquittance, as will be shown hereafter, was given to the *Newport News and Mississippi Valley Company* as the party liable, and therefore the party to be released (*id.*, p. 65). On June 14, 1890, the plaintiffs joined issue upon all three pleas. Nearly *two years thereafter*, viz., on June 4, 1892, a motion was made to withdraw joinder of issue to second plea and to strike said plea from the files. On July 5 leave was granted to plaintiff to withdraw replication to second plea and demur in ten days. Such demurrer, filed July 9, 1892, was sustained February 4, 1893. Motions made by the defendant on May 18, 1894, and November 30, 1896, to set aside the order sustaining this demurrer were overruled (*id.*, pp. 8 and 9).

The plaintiffs set out the corporate source and corporate power and extent of the C. & O. Railway Company, which extended from Fortress Monroe, and afterwards Newport News, Virginia, to the west bank of the Big Sandy river, a stream dividing the States of Kentucky and West Virginia. Soldier, the place at which the accident to the plaintiff happened, is a station on the line of the Elizabethtown, Lexington and Big Sandy railroad about fifty or sixty miles west of the Big Sandy. The E., L. & B. S. Co. was duly chartered under an act of the Kentucky legislature approved January 29, 1869, the act to take effect from and after its passage, the General Assembly reserving the right "*to alter, amend, or repeal this act.*" By an amendatory act *approved February 16, 1870*, power is granted to "sell the said Elizabethtown, Lexington and Big Sandy railroad *or lease the same*" (H. T. W. No. 2, Rec., p. 29).

By an act approved March 27, 1872, it is enacted that the E., L. & B. S. Co. and "the C. & O. Railway Company, a corporation, legally incorporated and organized under the laws of Virginia and West Virginia, and now existing

therein be, and each of them hereby is, authorized as a part of its railroad, to build and work a railroad bridge across the Big Sandy river" (Rec., pp. 27, 28, 29, 30). Under these acts the line of the Elizabethtown, Lexington and Big Sandy R. R. was constructed from Lexington, Kentucky, to the pier on the west bank of the Big Sandy river, terminal facilities in the city of Louisville being provided by a written agreement between the Louisville and Nashville R. R. Co., the Chesapeake and Ohio and Southwestern R. R. Co., and the E., L. & B. S. Co., bearing date December 28, 1881, which recites:

"Whereas the E., L. & B. S. Co. *owns, operates, and controls* the line of railroad from the eastern boundary of Kentucky, where it *connects with the line of the C. & O. railway* to Lexington, where it intersects and connects with the lines of the said party of the first part," &c.

And it being, the agreement states, "the desire of all the said parties to make such mutually advantageous arrangements *as shall enable the parties of the second and third parts to do business into the city of Louisville, and through the said city;*" terminal facilities are by said contract provided.

The party of the first part shall provide motive power, conductors and crews and shall transport for the parties of the second and third parts their trains, both freight and passenger, between Lexington and the Louisville, Cincinnati and Lexington or Short-line depots in Louisville," and "*open its line from Louisville to Cincinnati to the C., O. & S. W. Co. on the usual terms of business between connecting and friendly railroads, that is to say, all through business, both freight and passenger, shall be prorated between the parties thereto, according to the distance traversed on the respective roads of each, but freight and passengers to or from local points on any road shall pay local rates to such roads.*" Two years earlier, viz., on November 12, 1879, an agreement, in writing and under seal, had been entered into between the C. & O. Railway Company and the Elizabeth-

town, Lexington and Big Sandy R. R. Co., "the substance of which was that the C. & O. railway, whose line then terminated at Huntington, West Virginia, should extend its line some eight or nine miles from Huntington, in the State of West Virginia, to the western bank of the Big Sandy river, building a bridge across the Big Sandy river, and that the E., L. & B. S. R. R. Co., whose line then terminated at Mount Stirling, Kentucky, should build and complete its line from Mount Stirling to the Big Sandy river to a connection or point of junction with the C. & O. railway."

"In consideration whereof, the party of the first part (*i. e.*, the C. & O. Co.) agrees * * * *to allow the party of the second part the free and uninterrupted use of its railroad from the western bank of the Big Sandy river across said river and to the depot of the said party of the first part in said city of Huntington*, and to the use of depot, offices, &c., for the term of five years from the completion of the road" (Rec., pp. 30, 31, 32).

After this contract the Elizabethtown, Lexington and Big Sandy Company completed its line to a point of connection on the west bank of the Big Sandy river, and the C. & O. Co. completed its line to the same point in the early part of 1882 (*id.*, p. 45).

At this time Collis P. Huntington was largely interested in and was the controlling spirit in a number of railroads situated both west and east of the Mississippi. *He built many new lines and extended many old ones* and had a plan for bringing under practically one management a line of road extending from the Atlantic to the Pacific. His lines west of the Mississippi he ultimately consolidated under a Kentucky charter to the Southern Pacific Company. He had originally obtained for the same purpose an act of the Connecticut legislature incorporating the Southern Pacific Company, approved March 27th, 1884; which company was by charter "authorized and empowered to contract for and

acquire by purchase, or otherwise, *and buy, hold, own, lease*, &c., railroads, railroad bridges, engines, cars, rolling stock, &c., in any State or States or Territory of the United States or in any foreign country, &c.: Provided, however, that said corporation shall not have power to make joint stock with, lease, hold, own, or operate any railroad within the State of Connecticut." By an act approved March 10, 1885, the name of this company was changed to the Newport News and Mississippi Valley Company. Attention having been called to the proviso in the original act inhibiting the ownership, &c., of any railroad in the State of Connecticut, it was resolved by the assembly that the said act be amended by adding to said proviso the following: "*Unless such railroad shall be owned or operated within said State in conformity with the provisions of the general law of the State*," which was approved April 27, 1887 (*id.*) Under this charter he organized lines, which one by one he leased, east of the Mississippi, and which at the time of the accident complained of comprised the C. & O. and Southwestern, extending from the city of Louisville to the city of Memphis; the Elizabethtown, Lexington and Big Sandy R. R., which extended from the west bank of the Big Sandy to the city of Lexington, Kentucky, with a running arrangement over the Louisville and Nashville R. R. (under the contract heretofore referred to) into the city of Louisville, and the C. & O. railway, extending from Phœbus, a mile east of Fortress Monroe, to the west bank of the Big Sandy. *He was in the act of bringing into the system the Louisville, New Orleans and Texas Pacific Railway Company, which extended from Memphis to New Orleans, when financial troubles came and the plan was abandoned* (Rec., pp. 41, 42, 43).

The lease of the E., L. & B. S. R. R. Co. to the Newport News and Mississippi Valley Company was made on the 29th day of January, 1886 (Rec., p. 32 *et seq.*). The lease provides that "the party of the second part is to operate the said leased road and also the lines of railroad covered

by the agreements with the Ashland Coal and Iron Company and the C. & O. Railway Company" (*i. e.*, the agreement in respect to the railroad from the west bank of the Big Sandy river to Huntington), and shall pay "such amounts as it may become necessary to pay for damages to persons or property incurred in the course of operating the said railroads" (*id.*, p. 33). The lease of the C. & O. and S. W. R. R. was cotemporaneous with the lease of the E., L. & B. S. R. R. (*id.*, p. 61). Some five months thereafter, viz., on the 15th day of June, 1886, was executed the lease of the C. & O. Railway Company to the Newport News and Mississippi Valley Company (*id.*, p. 32 *et seq.*). The authority from the States of West Virginia and Virginia to the C. & O. Railway Company to make this lease was not proved by the plaintiff, but was afterwards proved by the defendant (Rec., pp. 73, 74, 75, 76). The lease executed by the C. & O. Railway Company to the N. N. & M. V. Company contained provisions in substance the same as the lease executed by the E., L. & B. S. Co.: "The party of the second part is to operate the said leased premises," &c., and to pay "such amounts as it may become necessary to pay for damages to persons or property incurred in the course of operating the said railroads," &c. (*id.*, p. 37). In the examination of H. W. Fuller, when called by the defendant, the plaintiff's counsel asked:

"Q. *When you became an employé of the N. N. & M. V. Co. did you employ Mr. Trigg and Mr. Chapin?* A. *Yes, practically so, certainly.*

"Q. *Did you receive any circular from the N. N. & M. V. Co. employing you when it became lessee?* A. *A circular was issued announcing the officials. My name appeared as the general passenger agent.*

"Mr. PERRY: *If there is any circular it ought to be produced.*

"The COURT: *Yes, we ought to have the circular on that subject.*"

In response to this call, Exhibit H. W. F. No. 1 was produced and read in evidence, being from the office of the president of the Newport News and Mississippi Valley Co., No. 23 Broad street, New York. The first paragraph is:

"*This company, having leased, from February 1, 1886, the Elizabethtown, Lexington and Big Sandy railroad and the Chesapeake and Ohio and Southwestern railroad, these properties will be operated for the present under the titles of the Eastern and the Western divisions, respectively.*"

The officers of the new company are announced. Among others, I. E. Gates, secretary and treasurer, New York, and Charles H. Tweed, general counsel, New York (*id.*, pp. 62, 63).

This circular or bulletin was publicly exhibited, so that all might see it; "*put upon board*," as an employé states, which may mean upon board of the train or bulletin-board (*id.*, p. 69). A similar circular, H. W. F. No. 2, was issued July 1, 1886, at the time of the lease of the C. & O. railway (*id.*, p. 62).

After these leases were made both roads (*i. e.*, the E., L. & B. S. R. R. from Lexington to the Big Sandy, and the C. & O. railway from the Big Sandy to Fortress Monroe) were operated by the Newport News and Mississippi Valley Company until, in consequence of financial embarrassment, the C. & O. Company was put into the hands of a receiver by decrees of the courts of Henrico county, Virginia, and Kanawha county, West Virginia (*id.*, pp. 41, 77–84). The bill (filed by C. P. Huntington), praying for a receiver, among other things, recites "that on the 15th day of June, 1886, said Chesapeake and Ohio Railway Company leased its railroad, extending from Phœbus, in the State of Virginia, to Huntington, in the State of West Virginia," &c., "and all equipment of the said Chesapeake and Ohio Railway Co. to the *Newport News and Mississippi Valley Company, a corporation duly incorporated, organized, and existing under*

and by virtue of the law of the State of Connecticut." A copy of said lease is filed with the bill, and also a copy of a judgment in the sum of $1,756,034.16 against said C. & O. Company and in favor of said Huntington (*id.*, pp. 78 and 79).

After the appointment of a receiver by the court "*the N. N. & M. V. Co. had nothing whatever to do with the C. & O. Railroad Company, but continued to operate the E., L. & B. S. under the lease from that road until the some time in* 1892, *I think*" (*id.*, p. 41).

The witness by whom the plaintiff proved the foregoing facts was asked the following questions:

"Q. While the N. N. & M. V. Company was operating the E., L. & B. S. Co. what relations had the C. & O. Railway Company with that company and the N. N. & M. V. Company? A. None whatever, except as set out in the lease of January 15, 1886.

"Q. What, if anything, did the C. & O. Railway Company have to do with the operation of the E., L. & B. S. R. R. at that time? A. Nothing whatever" (*id.*, p. 43).

"Q. What was that system called at that time? A. The N. N. & M. V. system; sometimes known as the C. & O. route."

The plaintiff's counsel exhibited a folder, purporting to be in effect November 21, 1886, giving connection and time of trains running between Washington and Louisville and other points, and given to the public by the authority of H. W. Fuller, who was the general passenger agent of the Newport News and Mississippi Valley Company; approved by John Muir, who was the general traffic manager of the said company, and approved by W. C. Wickham, who was the second vice-president of the said company.

(By PLAINTIFF'S COUNSEL:)

"Q. *It shows the road that under this lease was run by the Newport News and Mississippi Valley Company, does it not?* A. I think so."

The folder has on the back the words: "Time-table, C. & O., Newport News & Mississippi Valley Co." The witness explains that in railroad parlance C. & O. route is a trade-mark (*id.*, pp. 43, 44, 45).

"When the leases went into effect it might be possible that there was on hand an old stock of C. & O. tickets, but my impression is that this issue of tickets must have been exhausted by the time of the accident; *tickets were issued in the name of the Newport News and Mississippi Valley Company, as far as I know*" (*id.*, p. 46).

H. W. Fuller had become the agent of the C. & O. R. R. in 1883 or 1884, and had ceased to be such agent in 1886, at the time the Chesapeake and Ohio railway was leased to "the N. N. & M. V. Company, Eastern division," when he became "general passenger agent of the N. N. & M. V. Company, Eastern division, and the N. N. & M. V. Company, Western division. There were two divisions." The witness is asked:

"Q. *Immediately prior to the lease of the E., L. & B. S. road to the Newport News and Mississippi Valley Company, what road operated the Elizabethtown* (*i. e.*, the E., L. & B. S. R. R.)? A. *Always the E., L. & B. S.*

"Q. *Is it not a fact that the Chesapeake and Ohio operated it?* A. *No, sir; the Chesapeake and Ohio never operated it to my knowledge*" (*id.*, pp., 24, 25).

The plaintiff testified that in September, 1886, she being employed here in the Agricultural Department, had returned to her home in Jeffersonville, Indiana, to spend her vacation with her husband. After a stay of two months she started from Jeffersonville, which is just opposite Louisville, and at Meader's ticket office, which is in the last-named city, bought a ticket on the C. & O. road and started for Washington (*id.*, p. 11). She states that she saw the advertisement in the Louisville *Courier Journal*, shown (Rec., p. 20), but instead of going to ticket office, 225 Fourth street,

as therein directed, she went to Meader's ticket office—*i. e.*, to a scalper's (*id.*, p. 13). Had she gone to the office advertised, which the second advertisement introduced by her shows to have been the office of the Newport News and Mississippi Valley Company (*id.*, p. 21), *she would and could have bought only a Newport News and Mississippi Valley ticket. The only ticket agent in Louisville for the sale of tickets over the line of road from Lexington, Kentucky, to Charlottesville, Virginia, was the ticket agent of the Newport News and Mississippi Valley Company* (*id.*, p. 66). This is shown not only by the plaintiff's testimony (*id.*, p. 46), but explicitly and in detail by the defendant (pp. 66 and 67). The scalper himself testifies (in behalf of plaintiffs) that although he was accustomed to call the whole line of railway from Memphis to Washington the C. & O. route, he was well aware that *at the date of the sale of the ticket to the plaintiff the line of railway from Lexington to Huntington or Ashland was the Eastern division in Kentucky of the N. N. & M. V. Company* (*id.*, pp. 18 and 19).

A friend of the plaintiff, the ticket agent of the Pennsylvania R. R. Company, to whom she showed her ticket, says "it was the return portion of a ticket, sold in Washington, good for transportation between Louisville and Washington. The ticket purported to be issued by the C. & O. Railway Company" (*id.*). The exact copy of the ticket described by the preceding witness is to be found between pages 52 and 53, with the exception that a round-trip ticket would have on its face the letters "Ex.," representing excursion, and the coupons would be reversed. The scalper said nothing to indicate when he came into possession of this ticket or how old it was. This ticket, it will be seen, was issued, at some time in the past, by the Chesapeake and Ohio for passage over its own road, and also for passage between Louisville and Lexington on account of the L. & N. R. R., and between Lexington and Huntington on account of the E., L. & B. S. R. R.—*i. e.*, over roads other than the C. & O.

The purchaser of the ticket is expressly advised, as the first condition thereof:

"*In selling this ticket for passage over other roads, this company acts only as agent and assumes no responsibility beyond its own line.*"

Had there never been a lease of either road the purchaser of this ticket was expressly instructed that the road over which she proposed to travel was operated by different companies, and that no responsibility could possibly attach to the C. & O. railway for any part of the road in Kentucky. It was shown that it is "a very complicated matter to change an issue of tickets over railways" (*id.*, p. 56). But, as is conclusively shown, prior to the plaintiff's injury it had been accomplished.

The witness by whom the above proof was made continued in the service of the Newport News and Mississippi Valley Co. as ticket agent of said company at Louisville, Kentucky, until June, 1890 (*id.*, p. 66). The plaintiff states: "When I went to get on the train I saw the *card* of the Chesapeake and Ohio train." *This language does not properly describe the lettering on the cars, but only the card which is put up at stations to announce the departure of trains. Such a card at this point would have been put up by officials of the Louisville and Nashville, who certainly did not mean to imply thereby that the railroad on which the plaintiff embarked was Chesapeake and Ohio or anything else than Louisville and Nashville.* If this interpretation of the word "card" be correct, the uncontradicted proof is that the lettering on the train the night of the accident was "Newport News and Mississippi Valley Company" (*id.*, p. 72). Without reference to this particular night, the cars, engines, and coaches operated in 1886 over the E., L. & B. S. road between Huntington and Lexington were marked "Newport News and Mississippi Valley, Eastern division;" also the engines, those that they had changed. "When I was discharged,"

says the witness, "there were a good many E., L. & B. S. cars" (*id.*, p 68).

The plaintiffs read in evidence (both in chief and in rebuttal) the depositions of witnesses competent to judge, going to show that the accident was one which could not have been anticipated, and against which every reasonable precaution had been employed.

The release under seal executed by Mrs. Howard on November 24, 1886, to the Newport News and Mississippi Valley Company "in full compromise, satisfaction, and discharge of claims or causes of action accruing to her on account of personal injuries received by her *while a passenger on the cars of the company near Soldier station, Kentucky, which occurred on the night of 16th of November*, 1886," was proved by the defendant, in confirmation of defendant's third plea to the amended declaration (Rec., p. 65).

ASSIGNMENTS OF ERROR.

(1.) The Court of Appeals erred in holding that the allegations of the plaintiffs' declaration had been sustained in any particular.

(2.) The Court of Appeals erred in holding that the verbal directions of Mr. Huntington (Rec., p. 45) to subordinate officers whom he controlled created a contract for the operation of the E., L. & B. S. R. R. by the C. & O. R'y Co.

(3.) Assuming that the intention of this arrangement was to create such contract for operation, the Court of Appeals erred in holding that the termination thereof by Mr. Huntington (proved by the same testimony) did not necessarily and at once put an end to an arrangement which was illegal and void every moment that it lasted.

(4.) The Court of Appeals erred in holding that by this verbal direction of Mr. Huntington the C. & O. Railway

Company became responsible for the safe carriage of passengers over the E., L. & B. S. R. R. at any time, but more especially after the termination of said illegal and void agreement, if it ever existed.

(5.) The Court of Appeals erred in holding that the supposed illegal contract must be extended to the latter part of the year 1887 and could not be terminated earlier.

(6.) The Court of Appeals erred in holding that the charter of the E., L. & B. S. R. R. "*authorized it to make contracts with other corporations for the operation of its railway*" (Rec., p. 106), if by this language be meant otherwise than by lease, in which way it made no lease to the C. & O. Railway Co., and in which way the latter company was not authorized to take it.

(7.) The Court of Appeals erred in holding that the lease of the E., L., & B. S. R. R. to the N. N. & M. V. Company, which the former company was by charter authorized to make and the latter company was by charter authorized to take, was an invalid lease.

(8.) The Court of Appeals erred in holding that an unauthorized and void contract of the E., L. & B. S. R. R. with the C. & O. Company, if such there ever was, could operate to divest the former company of the power to make an authorized and valid one with another company.

(9.) *The Court of Appeals erred in holding that the N. N. & M. V. Company was legally incompetent to become lessee, and in further holding that, in consequence thereof, the C. & O. became legally responsible for the management of the E., L. & B. S. R. R.*

(10.) The Court of Appeals erred in holding that the lease of the C. & O. Railway Company (authorized at the time by

the general law of West Virginia and full compliance therewith, and subsequently ratified by the Virginia legislature) to the N. N. & M. V. Company was not a valid lease.

(11.) The Court of Appeals erred in holding that the act of the General Assembly of Virginia ratifying the lease of the C. & O. Railway Company to the Newport News and Mississippi Valley Company had no validity as against the plaintiffs.

(12.) The Court of Appeals erred in holding that the law of West Virginia granting authority to any railroad wholly or in part within said State to "lease its railroad or any part thereof, for a term of years, to any other corporation owning or *operating* any connecting line of railroad, whose line of railroad is completed or is in process of construction, wholly or partly within this State or an adjoining State, *in order to make a continuous line of railroad, to be run and operated with or without changes of cars or break of bulk, or exchange or transfer of passengers or freight,*" for the reason that the Connecticut corporation, at the time of the accrual of plaintiffs' right of action, had not built or undertaken to build a railroad anywhere (Rec., pp. 111-112), thereby adding terms and conditions to the statute.

(13.) *The Court of Appeals erred in holding that no attempt had been made to show the existence of any statutory authority of the State of West Virginia for the control or operation of the C. & O. railway by the Connecticut corporation.*

(14.) The Court of Appeals erred in holding that the decisions of the courts of West Virginia, cited by defendant's counsel, showed no recognition of the lease to the N. N. & M. V. Company, because "in no one of them was the validity of the lease involved," when in one, that of *Reece vs. N. N. & M. V. Co.*, 32 W. Va., 166, the question was whether the

defendant, " by accepting the provisions of the code of this State had become a corporation of this State " to such an extent as to have lost the right to remove the action to the Federal court—a question which could not arise unless the defendant was able to accept the provisions of the code, so as to become a lawful lessee.

(15.) The Court of Appeals erred in holding that in *Ricketts vs. C. & O. Railway Co.*, 33 W. Va., 434, " the defendant was held liable for an injury to a passenger on the Kentucky division in 1885," meaning thereby the E., L. & B. S. R. R., when, in point of fact, the decision was that a mere verbal arrangement to such effect could not make the E., L. & B. S. R. R. responsible for that part of the C. & O. railway between the Big Sandy and Huntington.

(16.) The Court of Appeals erred in holding that the compliance of the N. N. & M. V. Company with the provisions of the code of West Virginia, so as to enable it to do business in that State as " lessee of the works, property, and franchises of the C. & O. Railway Company," and the certificate of the secretary of state of West Virginia to the effect that it had done so, " are facts entitled to no weight whatever " (Rec., p. 112).

(17.) The Court of Appeals erred in holding that no such declaration from the secretary of state could have effect in law " when not in harmony with the public policy of the State, as shown in the general body of its laws," thereby assuming the existence of a body of law which would be in conflict therewith.

(18.) The Court of Appeals erred in holding that it was not error for the trial court to leave to the jury the construction and legal effect of the charters, statutes, leases, and agreements in writing and under seal in the case, on the

assumption that the leases were *prima facie* valid; and, further, for the reason that as he was entitled to instruct them that as matter of law the leases were invalid, no harm was done by the verdict of the jury to the same effect.

(19.) The Court of Appeals erred in holding that the N. N. & M. V. Company was not a valid and *bona fide* corporation, or that it was contrary to the policy of either Virginia or West Virginia for it to become the lessee of the C. & O. Railway Company.

(20.) The Court of Appeals erred in holding that service, in this District, on the servant of the receiver of the C. & O. Railway Company, appointed by the courts of Virginia and West Virginia, was service on the company.

(21.) The Court of Appeals erred in holding that when the receivership proceedings ended the defendant resumed the operation of the road in Kentucky, in the absence of testimony that it had so operated the road in Kentucky before said proceedings, and in disregard of the plaintiffs' uncontradicted testimony that the N. N. & M. V. Company continued to operate the E., L. & B. S. R. R. under the lease from that road until some time in 1892 (Rec., p. 41), or six years after the receivership proceedings ended.

(22.) The Court of Appeals erred in holding that the plaintiffs had a valid cause of action, even had the right company been sued.

(23.) The Court of Appeals erred in holding that the female plaintiff might avoid the release of her claim for damages, executed by her under seal to the Newport News and Mississippi Valley Company, by her own testimony, twelve years afterwards, that she was induced by false representations to sign the same. The court erred in hold-

ing that there was any testimony which justified the submission of this question to the jury. The court erred in holding that it might be so submitted when the release, which had been pleaded to the action in May, 1890, had never once been challenged as fraudulent; when in all the years which had intervened there had been no offer to return the money which was the consideration for it; when there was no plea of fraud under which it could be tried; and when, therefore, it was not one of the issues joined between plaintiffs and defendants which the jury had been sworn to try.

(24.) The Court of Appeals erred in sustaining the trial court in the refusal to strike out the parol testimony which was offered to contradict and avoid the release signed and sealed by the female plaintiff, and in refusing to instruct the jury that parol testimony was inadmissible for such purpose.

(25.) The Court of Appeals erred in sustaining the trial court in the refusal to instruct the jury that the cause of action in the amended declaration was barred by the statute of limitations.

(26.) The Court of Appeals erred in sustaining the trial court in the refusal to direct a verdict for the defendant at the close of the plaintiff's case and at the close of the whole case.

I.

POINTS AND AUTHORITIES.

First, Second, Third, Fourth, Fifth, and Fourteenth Assignments of Error.

The action is brought to recover damages for an injury sustained by the female plaintiff on a railroad in Kentucky known as the Elizabethtown, Lexington and Big Sandy road, which nine months and more before the accident and injury complained of, viz., on January 29, 1886, under express and ample legislative sanction, had been leased to the Newport News and Mississippi Valley Company and was so leased at the time of the accident. The action is brought against the Chesapeake and Ohio Railway Company, whose line of railway and charter limit was met for the first time in going east on the bank of the river which separates Kentucky from West Virginia, although the C. & O. Railway Company was neither owner nor lessee of the road in question, and had no right to operate it and did not operate it in any capacity, and at the time of the accident had been also leased to another company, and was not engaged in the operation of any road.

By no contract or arrangement, order, or direction can one railroad corporation be empowered to operate the railroad of another in the absence of legislative sanction. Without this sanction any contract by which a corporation seeks to accomplish such result is against public policy and void, and those who thereunder undertake to operate the road must be regarded as the agents of the corporation authorized by the legislature to do so. Save by legislative act, the powers and duties of one railroad corporation cannot be assigned to another.

The plaintiffs bring this action against the Chesapeake and Ohio Railway Company to recover damages alleged to have been sustained by the female plaintiff in the State of

Kentucky. They prove that the road on which the accident occurred was by the State of Kentucky (which alone had any authority in the premises) confided to a corporation known and described as the Elizabethtown, Lexington and Big Sandy R. R. Company. The plaintiffs set out the original charter of the last-named company and all the acts amendatory thereof. *They utterly fail to show any grant of power to the E., L. & B. S. Company to transfer, otherwise than by lease, the operation of their road to any other company, and they utterly fail to show any grant of power to the Chesapeake and Ohio Railway Company to assume the operation of the Elizabethtown, Lexington and Big Sandy R. R. by lease or otherwise. There was no such grant of power, and there was no lease to the Chesapeake and Ohio Railway Company, even had the latter been authorized and qualified to accept it.* The plaintiffs, therefore, prove with conclusive effect that there could have been no lawful operation of the Elizabethtown, Lexington and Big Sandy railroad by the Chesapeake and Ohio Railway Company. Had any such contract ever been entered into, it would have been a wholly unauthorized contract, illegal and void, as against public policy, and one, therefore, which there would have been a continuing obligation upon both parties to rescind and terminate, every instant of its illegal continuation. The plaintiffs do show the ample grant of power to the Elizabethtown, Lexington and Big Sandy Company to transfer the operation of their road by *lease* (amendatory act, H. T. W. No. 2, Rec., p. 29). They show the exercise of this power *by the lease of the Elizabethtown, Lexington and Big Sandy railroad to the Newport News and Mississippi Valley Company*, executed on January 29, 1886 (H. T. W. No. 8, *id.*, p. 32). They set out this lease and the ample authority to the Newport News and Mississippi Valley Company to take it (*id.*, p. 42). The proposition of the plaintiffs is that the proper party to be sued for the injury, alleged to have occurred on the line between Lexington and the Big Sandy,

on the 16th or 18th of November, 1886, is not the Elizabethtown, Lexington and Big Sandy railroad, the chartered owner of the road, nor the Newport News and Mississippi Valley Company, the legal lessee of the road, but another company, viz., the Chesapeake and Ohio Railway Company, which was not owner nor lessee and had no right to operate the E., L. & B. S. R. R. in any capacity.

Every written agreement which the plaintiffs produce is a writing which disproves their contention. The plaintiffs prove the exact relation between the Elizabethtown, Lexington and Big Sandy railroad and the C. & O. railway prior to the lease of the former by an agreement, under seal, of November 12, 1879, between the two corporations, which is the express recognition of the Big Sandy river, as the terrritorial limit of any railroad then operated or to be operated by the C. & O. railway. In consideration of the speedy completion of the road from Mount Sterling, in Kentucky, to the Big Sandy, it is agreed, not that the C. & O. railway shall or may operate any part of the E., L. & B. S. R. R., but the precise opposite, viz., that the latter road may have "*the free and uninterrupted use of the C. & O. railroad from the western bank of the Big Sandy river, across said river and to the depot of the said party of the first part (the C. & O. railway) in said city of Huntington*" (*id.*, p. 31).

It was more than the C. & O. rightfully could promise, but the excess of power was an excess to be acquired by the E., L. & B. S. Co. and to be parted with by the C. & O. Company. The "*free and uninterrupted use*" of the eight miles from Huntington, and the depot, offices, &c., there, was to be "for the term of five years from the date of the completion of the road between Huntington and the Big Sandy river" (*id.*, p. 32). The road was so completed "in the early part of 1882" (*id.*, p. 43). It is evident from the decisions in West Virginia that this contract was sought to be carried out in its entirety. Suit was brought against the C. & O. for a cause of action which arose on the line

between Huntington and the Big Sandy on or about December 21, 1885. The C. & O. defended on the ground that under an arrangement (it would seem the contract under seal was not introduced in evidence) this part of the line was operated by the E., L. & B. S. Company. "*By a verbal arrangement,*" it is said, "*the Elizabethtown, Lexington and Big Sandy Company operated that part of defendants' road between the Big Sandy river and Huntington*" (*Ricketts vs. C. & O. Railway Company*, 33 W. Va., 435). But in accordance with all the decisions of this court, and it is believed of every other court, the highest tribunal of West Virginia held:

"A railroad company chartered by a State cannot, *without distinct legislative authority*, by lease *or otherwise*, turn over to another company its road, and the use of its franchises, and thereby exempt itself from responsibility for the conduct and management of the road" (*id.*, p. 433).

The plaintiff had purchased his ticket in Kentucky "of an agent of the Elizabethtown, Lexington and Big Sandy Company."

In this connection it is proper to refer to the application which is made of this case by the learned court of appeals. It is said by this court:

"*See also Ricketts vs. C. & O. Ry Co.*, 33 W. Va., *where the defendant was held liable for an injury to a passenger on the Kentucky division in* 1885" (Rec., p. 114).

It is respectfully submitted that this interpretation of the decision in 33 W. Va. is the precise opposite of that intended by the court which gave it. The court in West Virginia held, not that the Chesapeake and Ohio was liable for an injury on the Elizabethtown, Lexington and Big Sandy R. R., but that the latter company was not liable for an injury on the Chesapeake and Ohio railway, for the reason "*that the Elizabethtown, Lexington and Big Sandy Company had not complied with the provisions of the statutes of this State in such manner as to authorize it to operate a railroad in this*

State" (*id.*, p. 435). But the E., L. & B. S. R. R. had complied with every provision of every statute which was required to authorize it to operate a railroad from the Big Sandy to Lexington. The West Virginia court decided that the Kentucky company was not responsible for the Virginia road, and that a mere "verbal arrangement" to this effect could not create the responsibility. This is interpreted to mean that the Virginia company was responsible for the Kentucky road, and that a mere "verbal arrangement" can create such responsibility.

"The Elizabethtown, Lexington and Big Sandy railroad ran its trains over a small piece of track from the Big Sandy river to Huntington, using thereby a portion of the C. & O. track, a small portion—eight or ten miles—which lay in West Virginia" (Rec., p. 63).

In the lease of the E., L. & B. S. Company it is expressly stipulated that thereunder shall pass all the rights and privileges "under and in pursuance of the agreements with the C. & O. Railway Company *in respect to the railroad from the west bank of the Big Sandy river to Huntington, in the State of West Virginia*" (*id.*, p. 32).

The deposition of the general solicitor of the C. & O. railway (who had been the counsel at the Richmond end of the line of the N. N. & M. V. Co.) was read in evidence by plaintiffs' counsel. To the question, "What, if anything, did the C. & O. Company have to do with the operation of the E., L. & B. S. R. R. at that time?" (*i. e.*, at the date of the lease of the last-mentioned company to the N. N. & M. V. Co.) he had answered, "Nothing whatever" (*id.*, p. 43). The same gentleman had produced in evidence the sealed instrument of November 12, 1879, to exhibit the relation between the two companies, the E., L. & B. S. Co. and the C. & O. Company (*id.*, p. 31). He then stated that after this contract of November 12, 1879, and after the completion of the road to the Big Sandy the properties were

operated together by one general manager, Mr. C. W. Smith, under the verbal directions of Mr. C. P. Huntington, *I have always understood*, who was president of the C. & O. Company and controlled a majority of the stock of the E., L. & B. S. R. R. Company. Under the arrangement, the officers of the Chesapeake and Ohio Company operated and maintained a line of railroad, for and on account of the E., L. & B. S. R. R. Co. from the west bank of the Big Sandy river to Lexington, and included in that also the eight miles of track between the west bank of the Big Sandy river and Huntington. They operated it, as I have said, for and on account of the E., L. & B. S. R. R. Company, keeping an account on the books of the C. & O. R. R. Company of all receipts of every character between Huntington and Lexington, *including also the Louisville connection*, and charged to the E., L. & B. S. R. R. Company all disbursements in that part of the line. The arrangement continued in effect until the organization of the N. N. & M. V. Company, *when its operating officers, who were General Wickham and Mr. Fuller, operated the properties under the leases.* The duration of this contract was five years from the date of the completion of the road, which was in the early part of 1882, which would have made the duration until 1887. The organization of the N. N. & M. V. Company terminated the contract, I suppose, by force of the arrangement then made. *It was terminated in the same manner it was made, by direction of Mr. Huntington.* Mr. Huntington directed Mr. Smith to operate the properties, as I have indicated, and *upon the formation of the Newport News and Mississippi Valley Company and the execution of the leases he directed the operation of the line to be in accordance with these leases*" (*id.*, p. 45).

It will be seen that the account of receipts kept on the books of the C. & O. railway included, in addition to the receipts for travel and traffic between Huntington and Lexington, the receipts for the same from the Louisville connection, and charged to the E., L. & B. S. Company all disbursements on

the whole line from Huntington to Lexington and from Lexington to Louisville. *This book-keeping, therefore, was no more the appropriation of the E., L. & B. S. Company than of the L. & N. Company.* In this paragraph consists the whole case of the plaintiffs. Their contention is that this verbal arrangement was the expression of a contract for the operation of the E., L. & B. S. R. R. by the C. & O. Co. According to the contention this verbal arrangement began to operate on the very day the sealed agreement of November 12, 1879, went into effect, and was to last for the same length of time. The contention is that these companies had only executed the sealed instrument for the purpose of disowning it; that the execution of a contract under seal and the practical revocation thereof were intended to be coincident; yet it is obvious that the written agreement, so far from being industriously set aside, was industriously executed (as shown by 33 W. Va., 433) three years after it was verbally supplanted. As shown by the same case (33 W. Va., 433), the local tickets were printed in the name of the E., L. & B. S. Co. on the line of this company. One would infer the "verbal arrangement" or direction referred to in the testimony of Mr. Wickham was the arrangement or direction for executing the contract of November 12, 1879. On December 21, 1885, this was the contract which the two companies were seeking to carry out, as far as it was in their power to do so.

The language of Mr. Fuller, by which it is sought to sustain the same contention, is shown by the following dialogue:

"Q. *Just before* you ceased to be employed by the C. & O. railway and became employed by the N. N. & M. V. Co. the C. & O. had been operated and run from Newport News to Lexington, Kentucky? A. Yes, sir; we had been operating that piece of road, the E., L. & B. S. R. R. We had not been operating it as the C. & O., though.

"Q. Why do you say we had been operating it? A. Simply it was turned over to us to operate.

"Q. Turned over to whom? A. Turned over to the offi-

cers of the C. & O. for the purpose of economy in operation" (*id.*, p. 57).

The witness explained that he used the word "operated" in connection with operation, so far as his own department was concerned—*i. e.*, "the issuing of tickets over that road, which is the extent of my jurisdiction and the extent of my department, practically."

"Q. And by operation you meant the issuing of tickets over the road? A. Yes; that is all I meant to refer to" (*id.*, p. 68).

It will be further observed that this witness states that this change occurred *just before* he "ceased to be employed by the C. & O. railway and became employed by the N. N. & M. V. Company."

The witness says:

"I and other traffic officials were appointed in charge of the business end of the road, *i. e.*, I had charge of the passenger business, the general freight agent had charge of the freight business, and the road had its own separate officers in every other department, as I understand it, except the traffic department, and I think its president" (the last, as shown by record, a mistake) (*id.*, p. 63).

Thus it would appear from this evidence that during a brief interval the E., L. & B. S. Company, in effect, adopted as its agents the general passenger agent and the general freight agent of the C. & O. railway. The witness states that he himself was at the time the general passenger agent, not only of the C. & O. railway and of the E., L. & B. S. R. R., but also of the Kentucky Central and of the lines south of Louisville; in all, four companies (*id.*, p. 64).

This common employment by four different corporations did not have the effect of blending them all into one. At the Sixth Street depot in this city there is one set of ticket agents who sell to New York by the Pennsylvania road and

south by the C. & O., by the Seaboard air line, by the Atlantic Coast Line, and by the Southern, and so at the freight department there is an agent who represents all the companies which ship goods to and from that freight depot. This employment of one official by several companies is for the same motive which governed the two roads which met on the west bank of the Big Sandy, "for the purposes of economy in operation."

There is no necessity for having a separate set of officers of that character. They simply occupy a similar relation to different companies.

When the C. & O. railway first began to transact business in Washington the company kept no agent here, but "the Virginia Midland then transacted the business" (Rec., p. 55). But this fact did not show that the Virginia Midland operated the C. & O. railroad, nor that the latter company operated the Virginia Midland. "The business" (*i. e.*, the receipts from the through business) "was divided *pro rata* per mile. We gave them (*i. e.*, the E., L. & B. S. R. R.) 140 miles in the prorate of the *through* ticket" (*id.*).

Mr. Fuller states with great clearness that in the years preceding the lease the line from Huntington to Lexington was operated by the E., L. & B. S. Co. only, and at the time of the accident by the N. N. & M. V. Co. only. The Chesapeake and Ohio never operated the E., L. & B. S. He says, "Prior to the leases we ran through cars over it—*that is, they took our through cars and handled them through*" (Rec., p. 63). Just exactly as at Lexington, the L. & N. by express contract with the E., L. & B. S. R. R. "took their through cars and handled them through" (Rec., p. 30). "Q. Who had charge of these trains?" "A. *The various superintendents over whose roads they ran*" (*id.*, p. 64). The traffic officials—*i. e.*, the general passenger ticket agent and the general freight agent—were the same, but the road (*i. e.*, the E., L. & B. S.) "*had its own separate officers in every other department*" (*id.*, p. 63). One can see from the leases that the sec-

retary of the E., L. & B. S. R. R. is W. C. Emery; that the secretary of the N. N. & M. V. Co. is I. E. Gates; of the C. & O. R'y Co., Edward T. Tournier. C. L. Robinson, the locomotive engineer on the E., L. & B. S., and afterwards on the N. N. & M. V., says that his run was between Huntington and Lexington (*id.*, p. 70)—that is, he was replaced by another as soon as he reached the terminus of the E., L. & B. S. Co. Similarly, J. A. Paul was conductor between Huntington and Lexington (*id.*, p. 71). These two witnesses were on the train the night the accident occurred; the witness Robinson saying he was "running on the M. V., called the N. N. & M. V. Company, or the E., L. & B. S. R. R.;" the witness Paul saying that he was conductor "running on the E., L. & B. S. road, the N. N. & M. V. Co."—*i. e.*, "*the E., L. & B. S. railroad was operated by the N. N. & M. V. Co.*" That which was habitual before the leases evidently was continued for some time afterward, and the locomotive engineer and conductor on the E., L. & B. S. division went no further east than Huntington, and no further west than Lexington. The witness, W. U. Carr, "in 1885 was engaged in braking on local freight on the Lexington and Big Sandy railroad *from Huntington, West Virginia, to Morehead, Kentucky. In the spring of 1886 the N. N. & M. V. Co. took the E., L. & B. S. R. R. and operated it, and witness ran as local brakeman on local freight until December 16, 1886, when he was promoted to conductor." The cars and engines and coaches operated in 1886 over the E., L. & B. S. road between Huntington and Lexington were marked N. N. & M. V., Eastern division, although in 1887 a good many cars were still marked E., L. & B. S.* During the whole time, from the spring of 1886 until March, 1887, the N. N. & M. V. road operated "the E., L. & B. S. road from Lexington to the Big Sandy river." "The bulletin put up on board and the change of name in the cars" gave witness notice of change in the government of the road (Rec., p. 68).

In *Pennsylvania Company vs. Jones* it was shown "that

James R. Wood was general passenger agent and Charles E. Pugh general manager of the Pennsylvania Company, stationed at Washington, and it likewise appeared that they occupied similar positions in the P., W. & B. R. R., the B. & P. R. R., the Alexandria and Washington railroad, and the Alexandria and Fredericksburg railroad," but this fact did not warrant the imposition of damages upon the Pennsylvania Company for an accident upon one of the other lines (155 U. S., 341).

If every official on the through trains had been one who was also employed on the C. & O. railway, it would not prove the operation by the latter company of the E., L. & B. S. railroad. The question has been exhaustively considered in *The Union Pacific Co. vs. Chicago, &c., Co.*, 163 U. S., 573.

Two learned justices, in a dissenting opinion, take the view that the contract in this case was for the operation of the road by the company styled lessee, but *for this reason* (there being no statutory sanction) they held it to be a void contract, which could be the foundation of no right, justify no claim, sustain no action (*id.*, p. 604). A majority of the court held that the contract was not a contract for the operation of the lessor's road by the lessee; did not transfer or diminish the dominion and control of the so-called lessor, and therefore was valid and should be sustained.

"The contention resolves itself into the proposition that there is a fundamental legal difference between authorizing the Rock Island to haul its trains with its own engines and agreeing to haul them with the Pacific Company's engines, though in either event they were to be moved under the train-dispatchers of the Pacific Company, a difference we find ourselves unable to admit" (*id.*, p. 583).

"It is impossible for us," said the Chief Justice, referring to an act of Congress of June 15, 1866 "*to ignore the great policy in favor of continuous lines thus declared by Congress, and that it is in effectuation of that policy that such business arrangements as will make such connections effective are made*" (*id.*, p. 589).

If, therefore, in the case at bar, prior to the lease of either company to the N. N. & M. V. Company, the fact had been that the same conductors, engineers, &c., had continued straight on from Huntington to Lexington and Louisville it would have meant that the connecting roads adopted as their own the same servants; but it so happens the fact is otherwise.

"They" (the E., L. & B. S. Company) "*took our through cars and hauled them through*" (*id.*, p. 63).

"Q. *Who had charge of these trains?* A. *The various superintendents over whose roads they ran*" (*id.*, p. 64).

The general passenger agent and general ticket agent were the same, but the E., L. & B. S. Company "*had its own separate officers in every other department*" (*id.*, p. 63).

In view of the plaintiffs' contention, what are we to make of the agreement of December 28, 1881 (Rec., p. 30)? This is an agreement between the Louisville and Nashville R. R. Co., the C. & O. and Southwestern Railway Company, and the Elizabethtown, Lexington and Big Sandy R. R. Co. The recital in respect to the party of the third part is:

"*Whereas the E., L. & B. S. Company owns, operates, and controls the line of railway from the eastern boundary of Kentucky, where it connects with the line of the C. & O. railway, to Lexington, where it intersects and connects with the lines of the said party of the first part.*"

Did the Elizabethtown, Lexington and Big Sandy R. R., in the very act of securing this agreement, arrange to have no trains to be transported, and to wholly cease the operation and control of the line which made it a desirable party to this tripartite agreement? Evidently the verbal directions of Mr. Huntington, given after the contract of November 12, 1879 (Rec., p. 31), were given to carry out that same contract, and not intended to be the simultaneous revocation by parol of an instrument under seal.

Thus the allegation by plaintiffs that the defendant on the 18th (or 16th) of November, 1886, and for a long time prior and subsequent thereto, had been operating a line of railway between Louisville and Washington is not only allegation without proof, but allegation which confronts the uncontradicted disproof by the plaintiffs themselves *that the line from Louisville to Lexington was operated by the defendant, or any other company than the Louisville and Nashville;* and, further, the clear proof that the C. & O. at no time operated any part of the line other than that between the Big Sandy and ~~Washington~~ Charlottesville, *and had ceased even to operate that portion of the line, unless a lease sanctioned by the statutes of Virginia and West Virginia can be set at naught and disregarded.* The allegation that her ticket entitled her to a passage upon said railway (*i. e.*, a railway operated by the defendant between Louisville and Washington) is disproved by the ticket itself (between pages 52 and 53), *which shows on its face that it entitled her to passage over lines not operated by the defendant, and that the lines from Louisville to the Big Sandy were not so operated.* Their allegation that "the said Laura P. Howard *purchased from an agent* of the defendant, at the said city of Louisville, a ticket entitling her to a passage upon the said railway from the said city of Louisville to the said city of Washington" *is disproved by the plaintiffs themselves, who show she bought her ticket from a scalper.* The allegation that the female plaintiff took passage on one of the defendant's passenger trains is disproved by her proof that the train she first entered *was one for which the L. & N. was responsible, and that the defendant at the time had no trains on any part of the line between Louisville and Washington or any other line.* The allegation that at or near the town of Soldier, Kentucky, she was injured by the carelessness of defendant's agents is disproved *by the statutes she offered in evidence, showing the agents at that point to be the agents of the N. N. & M. V. Company.*

II.

Sixth and Seventh Assignments of Error.

The record shows conclusively that there was no grant of power to the E., L. & B. S. Company to turn over the operation of its road to any company otherwise than by lease, and no grant of power to the C. & O. R'y Co. to assume the operation of any other railway than its own even by lease, and that no lease to the C. & O. R'y Co. was ever made; hence any contract to accomplish this object would have been a void contract, which neither party could enforce, but which there would have been a continuing duty upon both parties to terminate. The record conclusively shows that by a lease made with the sanction of the legislature the E., L. & B. S. R. R. did turn over the operation of its road to the N. N. & M. V. Co., which was authorized to take it, and that the latter company was the only one which at the time of the accident to the female plaintiff had the right and power to operate the railway between Lexington and the Big Sandy, and therefore the only one made by law responsible for injuries to passengers thereon. In any event, the only other which could have been so held would have been the E., L. & B. S. Co.

The learned Court of Appeals, ignoring the tripartite agreement for terminal facilities (Rec., p. 30) and the agreement under seal defining the relations between the C. & O. and the E., L. & B. S. Company, hold that the verbal direction of Mr. Huntington to which Mr. Wickham testified (*and which prior to his testimony could not have been known to the plaintiff or in anywise influenced her action*) was an agreement whereby the C. & O. railway became responsible for the safe carriage of passengers over the railway of the Elizabethtown, Lexington and Big Sandy R. R. "This 'arrangement' or contract," it is said, "for the operation of one line by the other was to extend to the latter part of the year 1887, or

about one year later than the injury to Mrs. Howard." The learned Court of Appeals saw the need of some legislative sanction for this, and supplied it as follows: "That charter (*i. e.*, the charter from the State of Kentucky to the E., L. & B. S. Company) "*authorized it to make contracts with other corporations for the operation of its railway*" (Rec., p. 106). If by this be meant verbal contracts there is no such grant of power.

It is true that the E., L. & B. S. Company by its charter is "authorized to make contracts with other corporations for the operation of its railway," but it is authorized to do this by lease and in no other way whatever (*id.*, p. 29). There was no lease to the C. & O. railway. Had there been, it would have been essential for the C. & O. railway to have been authorized by law to take the lease, and there was no such authority of law.

"No implication in favor of the power to make such a contract" (such as the Court of Appeals derives from the testimony mentioned) "*arises from the ordinary language of charters conferring the power to construct, but the power must expressly and affirmatively appear*" (5 Thomp. Corp., § 5880). Save by legislative act, the powers and duties of one railroad corporation cannot be assigned to another. The charter contains no such grant of power as the Court of Appeals attributes to it. If, therefore, the language of Mr. Wickham imported (in the teeth of his own disavowal) the contract claimed, it would have been wholly illegal and void, *and one which there would have been a continuing obligation upon both parties to terminate.* The very testimony by which this illegal and void contract is sought to be shown is conclusive that the state of affairs denoted thereby (whatever it might be) was terminated at the time of the lease, in January, 1886. "*It was terminated in the same manner it was made, by direction of Mr. Huntington*" (*id.*, p. 45). The testimony proves the lawful termination of that unlawful contract, if the same existed. Mr. Huntington

had no right to make the contract ascribed to him, but (assuming it to have been made) it was his incessant duty to bring it to an end, and the testimony is clear that it was brought to an end months before the plaintiff bought her ticket for Washington. It was abrogated by an instrument of equal dignity with that which created it—the direction of Mr. Huntington.

The implication is that a void contract cannot be avoided one day sooner than the term illegally appointed. The proof that the alleged contract ever existed is vague enough, but the proof of the termination of the illegal agreement (*i. e.*, the proof of the termination of the state of affairs which is so construed) is unequivocal. Assuming that in consequence of this direction the C. & O. railway (while it was in force) "became responsible for the safe carriage of passengers" over the railway of the E., L. & B. S. Company, as stated by the Court of Appeals (Rec., p. 106), how could this responsibility continue to exist after the "arrangement" or direction, in plain obedience to law, was revoked? How could there be a *de facto* operation of a road, under a "verbal direction" which never had any lawful existence, and ceased to exist at all months before the female plaintiff sustained her injuries at Soldier, Kentucky?

The law on this subject is settled if anything is.

"*A railway company is not authorized to give up the management of its line to another company.*"

Beman vs. Rufford, 6 Eng. L. & Eq., 106.

An agreement by one company that when their line is completed they will hand it over to be worked by another company "*is just the same thing practically as if they had leased the line to them.*"

Id., 110.

S. P., *Winch vs. Birkenhead, &c., Co.*, 13 Eng. L. & Eq., 506.

Gardner, &c., Co. vs. London, &c., Co., L. R., 2 Ch App. Cas., 211 (and p. 212).

In an action against the Willamette Valley and Coast R. R. Co. the defendant set up that the Oregon Pacific R. R. had agreed to build defendant's road, and was so engaged and had still the same in its possession at the time of the accident complained of, "and that the said Oregon Pacific R. R. Co. and not the defendant in fact sold to said Laura Lakin the ticket upon which the said Winnie P. Lakin was traveling at the time of her death and at the time the said W. P. Lakin was a passenger on the road."

"The defendant may contract for the construction of its road, but it cannot escape liability for injuries to passengers caused by the negligence of another which it permits or allows to use its road for the purposes of traffic. *In such case, as regards the public, those who operate the road must be regarded as the agents of the corporation. This doctrine is in accordance with sound public policy.*"

Lakin, Adm'r., vs. Willamette, &c., Co., 13 Or., pp. 438, 439, 440, 441.

S. P., *International R. R. vs. Moody*, 71 Tex., 616.

"As the owner of such franchise it (the *Oregon Railway, &c., Co.*) is invested with part of the sovereign powers of the State. True, it has made a contract with the other defendants, whereby it has leased for a definite period its lines of railway, and authorized another party to manage and operate the same. The State has not, however, by any law authorized or *ratified* the making of this lease, or consented to the transfer of the franchise, or relieved this corporation from responsibility as owner of its railway lines."

Van Dresser vs. Oregon, &c., Co., 48 Fed. Rep., 204.

The foregoing doctrine derives its strongest support from the decisions of this court. The general rule, as laid down in *Branch vs. Jessup*, is "that a railroad company, with only the ordinary power to construct and operate its road, cannot dispose of it to another company. *Legislative aid is necessary to that end.*"

106 U. S., 478.

Any contract which disables a railroad corporation from discharging the functions imposed by charter, and "undertakes *without the consent of the State* to transfer to others the rights and powers conferred by charter," is a violation of the contract with the State and is void as against public policy (*Thomas vs. R. R. Co.*, 101 U. S., 83)—a principle which is the logical sequence of the general doctrine in this country "that the powers of corporations organized under legislative statutes are such and such only as those statutes confer;" "that the charter of the corporation is the measure of its powers, and *that the enumeration of these powers implies the exclusion of all others*" (*id.*, p. 82). "As the just result of these cases (citing 101 U. S., 71, and others) and on sound principle," this court in a later case, after again declaring "that *unless specially authorized by its charter or aided by some other legislative action*" a railroad company cannot turn over to another the exercise of its powers, added, "Nor can any other railroad company without similar authority *make a contract to receive and operate such road, franchises, and property of the first corporation.*"

Penn. Co. vs. St. Louis, &c., Co., 118 U. S., 309.

"*A transfer of duty or obligation cannot be made by a void act. If there is no transfer of duty it remains where the law cast it, and if there is a culpable breach of duty resulting in injury the fact that there was an attempt to transfer the duty will not relieve the party upon whom the law imposed the duty from liability. If the duty remains unaffected by a transfer, as it does where the transfer is void, the breach of duty is the wrong of the party upon whom the duty was imposed by law.*"

2 Elliott on Railroads, § 466.

"Having entered into the agreement it was the *duty of the company to rescind and abandon it at the earliest moment.* This duty was independent of the clause in the contract which gave them the right to do it. *Though they delayed its performance for several years it was nevertheless a rightful act when it was done*" (101 U. S., 86).

Can these plaintiffs acquire the right to have such a contract (if such there was) extended for their benefit, so as to give them a right of action? Though not used in quite this connection, the words of the opinion are apposite:

"To hold that they can is, in our opinion, to hold *that any act performed in executing a void contract makes all its parts valid, and that the more that is done under a contract forbidden by the law the stronger is the claim to its enforcement by the courts*" (101 U. S., 86).

"*We know of no well-considered case where a corporation, which is party to a continuing contract which it had no power to make, seeks to retract and refuses to proceed further, can be compelled to do so*" (118 U. S., 317).

"The decisions of the Supreme Court of the United States assert and emphasize *a continuing duty of rescission*, upon the part of either of the corporations entering into the unlawful contract" (5 Thomp. on Corporations, § 5882).

The doctrine of *Thomas vs. R. R. Co.*, 101 U. S., 71, and of *Penn. R. R. Co. vs. St. Louis, &c., Co.*, 118 *id.*, 309, was reaffirmed in *Oregon Railway Co. vs. Oregonian Ry Co.* (130 U. S., pp. 21–23).

III.

Eighth Assignment of Error.

The record conclusively shows that prior to and at the time of the injury to the female plaintiff, at Soldier, Kentucky, the Newport News and Mississippi Valley Company was the lawful lessee of the road on which the accident occurred, and was engaged in the lawful operation thereof.

The lease of a railway, when authorized by charter or other legislative aid, effects a transfer to the lessee of the rights and liabilities pertaining to the management thereof.

While the proof in behalf of plaintiffs shows that there was no grant of power to the E., L. & B. S. Company to turn over the operation of its railway to another company otherwise than by *lease*, it does show that in this way it might be done, and, further, that in this and the only legal way the operation of the road was turned over to the N. N. and M. V. Company, a corporation authorized by law to receive it. The plaintiffs prove the statutory authority to the E., L. & B. S. R. R. to "lease the same" (Rec., p. 29, H. T. W. No. 2), and they prove the statutory authority to the N. N. & M. V. Co. to accept the lease (*id.*, p. 42, H. T. W. No. 7).

"*If a corporation is expressly authorized to transfer its franchises, then its grantee receives them indirectly from the legislature by virtue of express power conferred on the corporation to authorize another body of men to exercise its franchises or similar ones*" (Taylor on Corporations, § 131).

"The express grant of a right to lease a railroad authorizes the transfer by way of lease of all such incidents and appurtenances as are reasonably necessary to the operation of the demised road. This must on principle be the correct rule. * * * *It must be true that all incidents pass to the lessee, since the lessor, by executing a lease under legislative sanction, parts with all control and the lessee must operate the*

road or else it must cease to do business" (2 Elliott on Railroads, § 435).

"The general authority to lease implies the incidental authority to agree upon the consideration, terms, and conditions of the lease, and hence the contracting powers may agree that part or all of the consideration agreed upon may be yielded by guaranteeing payment of bonds" (*id.*, § 437).

"To say that after the lessor has by authority of law transferred the control and management of its road to another, he shall, unless specially exempted, remain liable for all the torts and contracts of the lessee, is to ignore the contract of lease and the legislative sanction under which it is made. * * * *With respect to the future management and operation of this road, the State had consented that from and after its lease, the lessee should stand as the substitute for the owner in regard to all those rights and liab lities which spring out of the future management and operation of the leased road"* (*Arrowsmith vs. Nashville, &c., R. R. Co.*, 57 Fed. Rep., 178; S. P., *St. Louis Co. vs. Curl*, 28 Kan., 444, *p. 624).

"Unquestionably, a railroad company *cannot without legislative authority lawfully lease its line of railway*, and in such case cannot, by in fact so doing, relieve itself of any liability flowing from the manner of its operation. * * * *It is, however, a different question when the lessor company is sought to be made liable for the negligent management of the road which it was authorized to lease, and of which management it had no control.* In such case we perceive no ground of public policy which should impose such liability upon the lessor company with respect to injuries resulting to individuals from the negligent operation of the railway" (*Hayes vs. Northern Pacific Railway*, 74 Fed. Rep., 282).

"The legislature in authorizing another corporation to take a lease, *by necessary implication*, confer the rights of the lessor on the lessee" (*R. R. Co. vs. Ely*, 65 Pa. St., 205).

"The act of the legislature granting to the defendant corporation the power to lease their road, and the lease made in conformity therewith, *are as authoritative and obligatory upon the defendants' lessees to perform the duties and discharge the liabilities thus devolved upon them as was the original charter upon the defendants themselves.* By these acts both parties to the charter of the defendant company assented to the change made and both they and the public must abide the result" (*Mahoney vs. A. & St. L. R. R. Co.*, 63 Me., 71).

In the *Oregon Railway Co. vs. Oregonian Ry Co.*, this court says: "Such a corporation can exercise no power or authority which is not granted to it *by the charter under which it exists or by some other act of the legislature which granted that charter*" (130 U. S., 21). But, by obvious implication, such corporation may exercise a power or authority which is "granted to it *by the charter under which it exists or by some other act of the legislature which granted that charter.*" In the case above cited the court says:

"We are here met with an embarrassment arising out of the circumstance that neither the plaintiff nor the defendant in the present case professes to exercise its powers *under any special charter conferred on it by the legislature of Oregon*" (130 U. S., 23).

But in the case at bar, as proved by plaintiffs, the E., L. & B. S. Company exercised the power to lease under the "*special charter conferred on it by the legislature*" *of Kentucky*, under whose law it exists (Rec., p. 29), and the N. N. & M. V. Co. exercised the power to take the lease under "*the special charter conferred on it by the legislature*" *of Connecticut*, the State which created it (Rec., p. 42); so that none of the embarrassment arises which was expressed in 130 U. S., 23. As said in 101 U. S., 82, "*the charter of a corporation is the measure of its powers,*" and the language in the same case (*id.*, p. 83), to the effect that any contract of the corporation "*which undertakes, without the consent of the State, to transfer to others the rights and powers conferred by the charter* and to relieve the grantees (*i. e.*, of the charter) of the burden which it imposes is a violation of the contract with the State and is void, as against public policy," is another way of saying that *with the consent of the State* it may be done.

"A corporation of one State leasing and operating a railroad in another State is, as to the leased road, subject to local legislation to the extent to which the lessee would

have been subject had there been no lease" (*Stone vs. Illinois Central R. R. Co.*, 116 U. S., 347).

In *Thomas vs. R. R. Co.* the court says:

"This brings us to the proposition that the legislature of New Jersey has given her consent by an act *which amounts to a ratification of this lease*" (101 U. S., 84).

Had the act in question amounted thereto the lease would have been "*made valid and ratified by the State.*"

"An authorized lease without any exemption clause absolves the lessor from the torts of the lessee resulting from the negligent operation and handling of its trains and the general management of the leased road, over which the lessor could have no control" (*Nugent vs. B. C. & M. R. R.*, 80 Me., 76).

In such case "the true doctrine is that it would not be liable for damages caused by the torts of the lessee" (*Briscoe vs. Southern Kansas R. R.*, 40 Fed. Rep., 278; S. P., *Heron vs. St. Paul, &c., R. R.*, 68 Minn., 542).

The lease to the N. N. & M. V. Company expressly provides that the lessee is to pay "*such amounts* as it may become necessary to pay for damages to persons or property incurred in the course of operating the said railroads" (Rec., p. 33).

It will be seen that no control whatever is left to the lessor, and that every resource and power is transferred to the lessee, and, naturally and justly, the liabilities with the resources wherewith to respond. Such is the relation proven by the plaintiffs to have been sustained by the E., L. & B. S. Company to the N. N. & M. V. Company on the 29th day of January, 1886, and to have existed at the date of the injury complained of. The legislative sanction to lessor and lessee to enter into this lease is also proved by the plaintiffs (Rec., pp. 29 and 42). *Hence the contention of the plaintiffs necessarily is that by a supposed prior verbal contract, wholly*

illegal and void, the subsequent authorized legal contract with the N. N. & M. V. Company was by anticipation superseded. But the same testimony which is supposed to prove the initiation of the unlawful contract incontestably proves a termination thereof, which was necessarily lawful, and which antedates by from nine to ten months the injury complained of. "It was terminated in the same manner it was made by direction of Mr. Huntington" (Rec., p. 45). *Any verbal permission or authority to the C. & O. Company given by the E., L. & B. S. Company (if such, as is supposed, ever was given) would be revoked necessarily by the lease of the latter company to the N. N. & M. V. Company.*

IV.

A void contract with the C. & O. Company could not divest the E., L & B. S. Co. of the power to make an authorized and valid one with another company.

Such verbal license, as is supposed and insisted on, would have been revocable *per se*. A parol agreement, if it can be called such, which it is insisted could not be performed within less than five years, would necessarily have been one not to be performed "within one year from the making thereof," and upon which, therefore, under the statute of frauds, no action could be brought. An agreement which neither party could enforce by action, either party had power to terminate. Further, the interest of operating this property and any transfer thereof was an interest in land.

East Pennsylvania Co. vs. Scholenberger, 54 Pa. St., 147.

If there were no such paramount rule as that laid down in 101 U. S., 86, such interest, if sought to be created by parol and not put in writing, under the same statute "shall have the force and effect of leases or estates at will only,"

and in the case at bar would have existed only by the will of Mr. Huntington.

Were it doubtful whether lessor or lessee should be held liable for the negligent management of trains on the leased road, on what possible ground can an action be sustained against the defendant company, which was neither lessor nor lessee?

If the Chesapeake and Ohio Railway Company had been the same corporation as the Elizabethtown, Lexington and Big Sandy railroad; if, as a consequence of Mr. Huntington's verbal directions, it had been turned into an identical corporation, every responsibility for the operation of the E., L. & B. S. R. R. would have terminated with the lease of the latter road to the N. N. & M. V. Co. It would have been impossible for the C. & O. R'y Co., through the lawless act of its president, to have acquired a more invincible power to operate the E., L. & B. S. R. R. than was possessed by the lawful owner thereof. The lease, which transferred the legitimate power of operating the road from the party made by charter responsible therefor, certainly terminated any and all illegitimate power of an unlawful intruder thereon. *Giving to the supposed unlawful agreement all the force attributed to it by the Court of Appeals, the lease to the N. N. & M. V. Co. would have been the legal termination of an illegal arrangement. Any verbal permission to the C. & O. Company, given by the E., L. & B. S. Company, would be revoked necessarily by the lease of the latter company to the N. N. & M. V. Company. Corporations may invoke the aid of a court to relieve them from their illegal contracts, but nobody can ask a court to enforce them.*

Finally, had there never been a lease to the N. N. & M. V. Company, how could the plaintiffs, who disclaim all claim under contract and bring this action against the C. & O. R'y Company for breach of the public duties of a common carrier, derive the public duty of said carrier from a secret contract, which, if it existed, was a gross violation of public duty imposed not upon the C. & O. R'y Company, but upon the E., L. & B. S. R. R.? An action is sought to be main-

tained against the C. & O. R'y Company on the ground that the person injured is a member of the public, with a right to rely upon the public duties imposed upon the C. & O. Railway Company. *But was the operation of the E., L. & B. S. R. R. a public duty imposed on the C. & O. R'y Co. by any public law upon which any member of the public could rightfully rely?*

V.

Ninth and Nineteenth Assignments of Error.

Even if, as is contended, by reason of the original sin of the N. N. & M. V. Company, no valid lease could be made to it by the C. & O. Railway Co., and therefore, after such attempted lease, the C. & O. Railway Company would continue to be responsible for the management of the road of which it was lessor, it could not in consequence of the ineffectual lease of its own road become responsible for another road, in another State, owned by another company, and operated by another company.

In referring to what is termed the chief point of defendant's contention, viz, that "the arrangement" (*i. e.*, Mr. Huntington's verbal direction) had come to an end by reason of the leases in January and June, 1886, by the E., L. & B. S. Company and the C. & O. Railway Company to the N. N. & M. V. Company, the Court of Appeals, in a former opinion, used this language respecting the latter:

"This general lessee corporation was incorporated by the State of Connecticut, March 27, 1884, &c. One clause is given, however, which expressly forbids the power 'to make joint stock with, own, hold, or operate any railroad in the State of Connecticut.' Virtually banished from the State of its creation, this corporation came to the State of Virginia, and apparently without permission of that State, leased and *undertook to operate and exercise the franchises of the defendant.* * * * Whilst the lessee might become

liable for an injury done in the operation of the railway, the lessor would not be exempt *by reason of its retirement therefrom*. Two things must concur to give full legal operation to a lease by one such corporation to another, viz., the permission of the State through power expressly conferred upon each. There is nothing in the record to show that the State of Virginia ever authorized the lease by defendant of its railway, nor does it appear that the existence of the N. N. & M. V. Company had ever been recognized by that State or the State of Kentucky, much less the power conferred upon it to lease and operate a railway therein. *If it had been proved that the defendant had the general power to lease its road that seems to have been conferred upon the E., L. & B. S. Company, and that the N. N. & M. V. Company had the general power under its charter to lease and operate railways anywhere outside of the limits of Connecticut, we could not regard this lease as exempting the defendant from liability.* * * * The *bona fide* corporations of one State have been permitted to enter the others, to maintain offices, to transact business, and to maintain their rights in the courts, where their business and objects have not been immoral or opposed to sound and well-defined public policy; but comity has never been stretched so far by any State as to permit the corporation of another State to exercise an extraordinary power or franchise within its boundaries without its own express grant. * * * The amendment of April 27, 1887, added these words: '*Unless such railway shall be held, owned, or operated within said State in conformity with the provisions of the general laws of the State.*' It is not necessary to consider the effect of this amendment, because it took effect long after the accrual of plaintiff's cause of action" (*Howard vs. Railway Co.*, 11 App. D. C., 341, 342).

It is obvious that when the charter was originally granted, some legislator supposed that a Connecticut corporation would not necessarily be subject to Connecticut law, when operating a railroad in the State of Connecticut. An amendment was added to settle the fact that it would be. The charter itself was perfectly satisfactory to the State which granted it. It was made whole without a word of change in the charter itself. The proviso which was added existed

originally in contemplation of law and did not need to be added, and the original restriction must have been owing to some erroneous impression of some erroneous lawmaker. How could it injure or impair any right of action which had accrued to the plaintiff for the legislature to determine (months before she brought her action) that there was a perfectly legal lessee of the road on which she traveled? Did the plaintiff have a vested right to an illegal lessee?

But even if the view of the Court of Appeals be absolutely correct as to the non-contractual power of this heinous corporation, how would such conclusion fasten liability upon the C. & O. for the operation of the E., L. & B. S. R. R.? In the absence of a valid lease the C. & O. R. R. might be held liable for accidents upon the road of which it was the *de jure* operator, viz., the C. & O. railway. But how could it be liable for accidents on a road which it operated neither *de jure* nor *de facto*, viz., the road which, if there was no valid lease, the E., L. & B. S. Company operated *de jure*, but which, whether with or without law, the N. N. & M. V. Co. operated *de facto*?

The Court of Appeals admits (Rec., p. 114) that the N. N. & M. V. Co. was in *de facto* operation of both roads, and insists (as will be seen hereafter) that this (and no more than this) has been decided by the highest court of West Virginia. Grant the lease to be invalid, and that, in consequence, the C. & O. continued to be liable for the operation of the road it was chartered to operate, *how could this make it liable for a road it was not chartered to operate, could not lawfully operate—which, whether rightfully or wrongfully, the N. N. & M. V. Co. did, in fact, operate?* How can the C. & O. Railway Company, chartered by the two Virginias, be made a constructive law-breaker, in consequence of the wrongful operation of another road, in another State, by another company? At the outside, the lessor, by "retirement therefrom," would remain responsible for the franchise which had been lawfully granted to it, and which it was under obliga-

tion to exercise. *In such case it would not make itself liable for a franchise which had not been granted to it, and which it could not exercise without flagrant violation of law.*

"The lessor," says the court, "would not be exempt by reason of its retirement therefrom"—*i. e.*, from the operation of its road; but, surely, it would be exempt by reason of retirement from a road which was not its own.

The Court of Appeals expressly adjudicates that, "in contemplation of law, both of these connecting lines in Virginia and Kentucky, respectively, were being operated at the time *by their lawful owners, notwithstanding the immediate and active but unauthorized and unconfirmed agency of the Connecticut corporation therein*" (Rec., p. 112). But who was the lawful owner of the road in Kentucky on which the accident occurred? Unquestionably the E., L. & B. S. R. R. And whether lawfully or otherwise, "the immediate and active agent" for the operation thereof was the N. N. & M. V. Company—"the Connecticut corporation." How, out of this ascertained and adjudicated relation of the carriers, can authority be deduced for subjecting to liability the C. & O. Railway Company, which was not the immediate and active, not the authorized nor unauthorized agent of such operation?

In the present record it is shown by plaintiffs that the N. N. & M. V. Company "had the general power under its charter to lease and operate railways anywhere outside of the limits of Connecticut." As will now be more particularly mentioned, it was proved by the defendant that power was given to the C. & O. Railway Co., both by general law and special statute, to make the lease to the N. N. & M. V. Company.

VI.

Tenth, Eleventh, Twelfth, Fourteenth, Sixteenth, Seventeenth, and Eighteenth Assignments of Error.

The record shows conclusively that at the time of the accident to the plaintiff the Chesapeake and Ohio Railway Company, not only did not operate the E., L. & B. S. road, but that it did not and could not operate any railroad, not even the road it was by charter authorized to operate, having, with legislative sanction, transferred the right and power to do so to the N. N. & M. V. Company.

The legislative sanction to the C. & O. Railway Company to make the lease to the N. N. & M. V. Company was not shown in a former record which went up to the Court of Appeals of the District of Columbia, and in this connection it was then said: "There is nothing in the record to show that the State of Virginia ever authorized the lease by defendant of its railway," and, assuming there was no such sanction, it was added:

> "Had this corporation (*i. e.*, the N. N. & M. V. Company) been recognized in the exercise of these powers by the court of appeals of Virginia, *we would feel bound to follow its decision and give effect to the lease within the limits of that State.*"
>
> 11 App. D. C., 339.

There happens to be one case only in the State of Virginia in which "this corporation is a party"—the case of *Stewart's Adm'r vs. N. N. & M. V. Co.*, 86 Va., 988. James Stewart, in walking across defendant's pier at Newport News, fell into a chute and was killed. In the trial court it was held that his own negligence was the cause of the accident, and this judgment was affirmed. It is stated in the opinion that the defendant in error was "operator of a coal

pier at Newport News"—*i. e.*, the pier from which the said James Stewart fell and was killed. The defendant in error was so operating said pier because it was operating the road which had been leased from the Chesapeake and Ohio Railway Company. There was no need for the court to say very much, but in what is said "this corporation" is "recognized in the exercise of these powers."

Further, after calling the attention of the trial court to the fact that the regular session of the Virginia assembly of 1885-'6 ended about March, 1886, and that the first session after the execution of the lease was an extra session, which extended from March 23 to May 24, 1887, the defendant put in evidence the following:

"AN ACT to ratify and confirm the lease of the Chesapeake and Ohio railway to the Newport News and Mississippi Valley Company, approved May 14, 1887.

(1.) *Be it enacted by the General Assembly of Virginia, That the lease made by the Chesapeake and Ohio Railway Company to the Newport News and Mississippi Valley Company of its railroad, property, and rights, bearing date on the 15th day of June, 1886, be and the same is hereby ratified and confirmed: Provided, however, That the said N. N. & M. V. Company shall pay all taxes assessed upon its property or the property of the C. & O. Railway Company in lawful money and not in coupons.*

(2.) *This act shall be in force from its passage.*"

The learned Court of Appeals first intimates a doubt whether this act of ratification gave any validity to the lease prior to the date of ratification (Rec., p. 111). Certainly to turn a lease bearing date June 15, 1886, into a lease bearing date May 14, 1887, would be an unusual effect of ratifying and confirming. The confirmation of a contract is not the creation of a new contract, but the establishment of an existing one. It is an elementary maxim that the effect of a subsequent ratification is equivalent to original authority.

"It operates upon the act ratified in the same manner as though the authority of the agent to do the act existed originally."

Marsh vs. Fulton County, 10 Wall., 684.

"Legislative recognition of an act or a corporation validates the act or the corporation, although neither one nor the other may have had full prior legal authority."

Brewer, J., in *Street vs. U. S.*, 133 U. S., 307.

S. P., *Comanche County vs. Lewis*, *id.*, 202.

"Ratification relates back to the inception of the transaction and has a complete retroactive agency."

Story on Agency, § 244.

Granting, however, that the act was intended to be retrospective, the learned court argues that "it cannot take away the right of the plaintiff that had become vested during the intervening time" (*id.*, p. 111). It is certainly not intended to controvert the doctrine, sound in ethics and in law, that an exception to the retroactive efficacy of a ratifying act is where the rights of third parties have intervened between the act and the ratification. But what right could have vested in the plaintiff had she sustained an injury on the C. & O. road? Her vested right would have been a right of action against the party legally liable. Months before she brought any action the legislature of Virginia ratified and confirmed the lease, which provided that from the 15th of June, 1886, the N. N. & M. V. Company and this company alone should be answerable for any damages incurred in operating the C. & O. railway (*id.*, p. 37).

How did it divest any vested right to publish to the world that this was the corporation to be sued, by any one to whom such right of action had accrued? Any vested right of action of this plaintiff was not a right to bring an action against the C. & O. Railway Company, but a right to bring an action against the party legally liable. What injury is worked when one to whom a vested right of action has ac-

crued is told distinctly by the law-making power against whom to bring the action?

The State of West Virginia also had a voice in the transfer of the rights and powers of the C. & O. railway to the N. N. & M. V. Company. The defendant offered in evidence the duly authenticated copy of the general law of West Virginia (§ 53 of chapter 54 of the Code) which enacts that "no railroad owning or operating a road, wholly or in part, within this State shall consolidate its capital stock with any other railroad *running a parallel or competing line without the consent of the legislature;* but any such railroad corporation whose line of railroad is made or is in process of construction may merge or consolidate with *or lease its railroad*, or any part thereof, for a term of years to any other corporation *owning or operating any connecting line of railroad* whose line of road is completed or is in process of construction, wholly or partly, within this or an adjoining State, *in order to make a continuous line of railroad, to be run and operated with or without changes of cars, or break of bulk, or exchange or transfer of passengers or freight* (Rec., p. 73); and also the duly authenticated copy of another act containing the conditions upon which any corporation incorporated elsewhere may hold property and transact business in West Virginia."

Such corporation is required to "file in the office of the secretary of state a writing, duly executed under the corporate seal, accepting the provisions of this section and agreeing to be governed thereby" (*id*).

The exact compliance of the N. N. & M. V. Co. with all the requirements of the above-cited section was fully proved, including the acceptance by the said company of the provisions of this section, so as to enable it "to do business as such corporation *as lessee of the works, property, and franchises of the Chesapeake and Ohio Railway Company*," and the certificate of the secretary of state of West Virginia that the same had been fully complied with (*id.*, pp. 73, '4, '5).

"In most of the charters there is a provision that the company may lease its road, *or the general statute so provides*, and where *such* authority is conferred *no question can arise as to the power of the company in this respect*" (3 Wood's Railway Law, p. 1686, § 489).

The Court of Appeals states that § 53 of chapter 54 of the Code of West Virginia gives no sanction to the lease in question, because "it clearly appears from the evidence that the Connecticut corporation at the time of the accrual of plaintiff's right of action had not built or undertaken to build a railroad anywhere, and that it has not constructed one, either wholly or in part, since," and that the declaration of the Connecticut corporation and the certificate of the secretary of state are facts entitled to no weight whatever. "That officer had no authority to bind the State to a greater extent than that expressly conferred upon him by law" (*id.*, pp. 111 and 112).

If it be thought important in this connection, as a matter of fact, the record does show that Mr. Huntington (who is considered to embody the N. N. & M. V. Company) "built many new lines and extended many old ones" (Rec., p. 41). It might also be a question whether, under this law, the secretary of state of West Virginia be not as authentic a medium to interpret to the public, foreign and domestic, the sanctions which exist thereunder, as our Court of Appeals. It is, however, more pertinent to suggest that the policy of West Virginia has been misconceived by the learned court. The real policy of the State is that described by Chief Justice Fuller as "*the great policy in favor of continuous lines*" (163 U. S., 589). As this court said in construing a similar policy in Kentucky:

> "*The evil which was intended to be guarded against by this limitation was the placing of parallel and competing roads under one management and control.*"
>
> *Hancock vs. L. & N. R. R. Co.*, 145 U. S., 412

In the case at bar the line of the connecting railroad was "completed." It was "wholly within an adjoining State, and the lease was plainly entered into" in order to make a continuous line of railroad to be run and operated with or without change of cars," &c. Under the law the lease may be made to corporations "owning or operating any connecting line of railroad." They need not be owners; they may be purchasers or lessees.

"It has become customary for a State adjacent to the States creating a railroad corporation to legislatively grant authority to such foreign corporation to enter its territory with its road—to make running arrangements with its own railroads—*to buy or lease them or to consolidate with the companies owning them.* Sometimes, as in the present case, such foreign corporation is declared, upon its acceptance of prescribed terms and conditions, to become a domestic corporation of such adjacent State" (*St. Louis and San Francisco R. R. Co. vs. James*, 161 U. S., pp. 555 and 562).

In construing a lease made under a general law similar to that of West Virginia, it has been held in a late decision:

"That a railroad company may not lease its line and turn the operation of its road over to another railroad company *without legislative authority for so doing may be conceded.* * * * *That it may by legislative permission lease its property and put another in the performance of its duties may likewise be conceded;* and where in pursuance to the authority conferred an instrument of lease is executed, such instrument must be construed, we think, as like instruments between other corporations or between private individuals. If the authority to lease is general, the lease may be general in its terms, and without conditions, except such as the parties choose to insert. * * * To hold otherwise it would have to be that the lessee company was not a lessee, *but was a mere agent of the lessor;* and indeed counsel for plaintiff in error would have it thought that such was the case. The statute, however, *only authorizes the making of leases, not contracts of agency.* * * * The

demands of public policy are satisfied and the rights of third persons secured *by the imposition upon the lessee of all liability incident to the exercise of the franchise by it*, and the demands of what the common law in such cases esteems to be just are likewise secured by exempting the lessor from liability" (*Caruthers vs. Kansas City, &c., Co.*, 44 L. R. A., 743, 744, 745).

"*In authorizing the execution of a lease, the legislature grants the right to execute and carry into effect such an instrument as divests the lessor of possession and control, and places it in the lessee to the exclusion of the lessor. The possession of the one party is excluded and that of the other is made complete by legislative sanction*" (2 Elliot on Railroads, § 469; S. P., Hutchinson on Carriers, 515*b*).

The Court of Appeals of West Virginia would seem to have been unaware that either the secretary of state or the corporation had misapprehended the statute. *Bullington vs. Newport News and M. V. Co.*, 32 W. Va., 436, was an action brought against the defendant for killing stock in Kanawha county. "Said corporation," it is stated in the opinion, "was *operating a railroad* through said county, and on the 24th day of April, 1887, *a locomotive of defendant* with tender and caboose attached *under the control and management of the agents of said corporation* killed two horses belonging to the plaintiff." Were this the only case involving the operation of the C. & O. by the N. N. & M. V. Co., "this corporation" would be thereby "recognized in the exercise of these powers by the Court of Appeals" of West Virginia. But there are more decided recognitions. The case of *Reese vs. N. N. & M. V. Co.* involved the question whether the defendant by the acceptance of the provisions of the West Virginia code had become so thoroughly "*a domestic corporation*" of the State as to be deprived of the right to resort to the Federal courts. The facts under review are thus stated in the opinion of the court:

"*Prior to the year 1886, the defendant, The Newport News and Mississippi Valley Company, was incorporated under the laws of the State of Connecticut with power to construct, buy, hold, own,*

lease, equip, and operate any railroads, &c., in any State, &c., provided that said corporation shall not have power to lease, hold, own or operate any railroad within the State of Connecticut. This proviso was by the General Assembly of Connecticut, in January, 1887, amended by adding thereto these words: 'Unless such railroad shall be held, owned, or operated within said State in conformity with the provisions of the general railroad laws of this State.' "

It will be observed that this opinion repeats, with apparent unconcern, the language which is so objectionable to the Court of Appeals.

The opinion proceeds:

"The said company prior to the date of the injury complained of in the declaration *became the lessee of the road, property, and franchises of the Chesapeake and Ohio Railway Company, a domestic corporation and citizen of this State*, and at said date and since as well as on and *prior to the 27th day of July, 1886*, the defendant company was engaged as a public and common carrier for hire of passengers and all kinds of freights from the town of Newport News, in the State of Virginia, in and through the State of Virginia and this State to the city of Lexington, in the State of Kentucky *as such lessee of the C. & O. Railway Companies and other railroad companies*, and it was then and still is operating a continuous line of railways and carrying on interstate commerce in and through the States aforesaid, having its principal offices in the State of New York and in the city of Richmond, State of Virginia, and the defendant company did on said 27th day of July, 1886, *by a writing duly executed under its corporate seal and filed in the office of the secretary of state of this State accept the provisions of the code*," & (repeating the provisions heretofore quoted).

"The only question before us is whether or not the facts above stated entitle the defendant to a removal of this action to the district court. * * * *The said company is by its charter authorized to construct, hold, own, lease, and operate any railroad, and the record in this case distinctly shows that it is, and was on July 26, 1886, doing business as a railroad company in this State, and that it must therefore be regarded as*

such within the intent of said statute. * * * *The fact that the defendant has leased and is operating the railroad of a corporation of this State does not make it a citizen of this State within the meaning of the Constitution and laws of the United States.* * * * The defendant here being, as we have seen, a foreign corporation, notwithstanding the declaration of our statute that it shall be a domestic corporation, the said provision of our statute, so far as it attempts to take from the defendant the right to remove any suit to the Federal courts, as well as the agreement filed by it in pursuance of said provision, must be held inoperative *to prevent such removal in any suit in which it would have the right of removal under the Constitution and laws of the United States*" (32 W. Va., pp. 166, 167, 168, 169, 172, 173).

In an action of trespass on the case brought against the same defendant the declaration alleged "that the defendant was a corporation under the laws of the State of Connecticut, doing business in the States of Kentucky and West Virginia; *that the defendant leased and operated a railroad called the 'Elizabethtown, Lexington & Big Sandy railroad,' extending from Catlettsburg, in Kentucky, to Lexington, in Kentucky,*" and that plaintiff was injured by the defect of a tank at a station called Leon, in Kentucky. The controversy arose on a plea in abatement as to whether the N. N. & M. V. Co. could be sued in Virginia for an injury upon a railroad *operated by it in Kentucky.* The defendant claimed that under an act of 1870, amending and confirming the charter of the C. & O. R. R., service of process upon it could only be made in Kanawha county.

"The plea avers that *the principal offices of the company were in New York, &c., and that its principal place of business in West Virginia, on the Chesapeake and Ohio R. R., which it operates, as aforesaid,* is the station or depot on said line of railroad opposite the city of Charleston, in, &c., the principal office in this State of *said C. & O. railroad, and this defendant, its lessee.* The plea does not aver all facts necessary to make the Charleston station such office * * * and, *moreover, this*

is a different corporation from the C. & O. R. R. Co. Therefore the court did not err in rejecting the plea."

33 W. Va., pp. 136, 139, 140.

Three things seem to be clear to the highest court of West Virginia: 1st, That the N. N. & M. V. Company is the lessee of the E., L. & B. S. railroad, and is responsible for accidents thereon; 2d, that it is also the lessee of the C. & O. Railway Company, and as such lessee operates the railroad of the last-mentioned company in West Virginia and may be sued therein; 3d, that it is a different corporation from the C. & O. Railway Company. It is not easy to evade the conclusion that for torts committed in the management of railroads operated under lease by the N. N. & M. V. Co., a different corporation, viz., the C. & O. Co., cannot be made responsible.

It is said by the Court of Appeals, however: "In no one of these (the cases cited by counsel for defendant) was the validity of the lease involved." If by this language be meant that the validity of the lease was not questioned, it is entirely accurate. Nowhere outside of this District has the validity of the lease ever been questioned. It is stated in the plaintiffs' proof: "No question was ever made as to the validity of the lease" (Rec., p. 48). *But the decision of the highest court of West Virginia involved the validity of the lease and sustained rights which could only be claimed by virtue of a valid lease.*

The West Virginia court affirms that, prior to the injury complained of, the N. N. & M. V. Co. "*became the lessee of the road, property, and franchises of the C. & O. Railway Co.*" and was engaged in the transportation of passengers and freight "*as such lessee.*" Can this language be construed to mean that the said company became an unlawful lessee, and, as such unlawful lessee, was engaged as stated? The defendant, it is stated, "did on the 27th of July, 1886, *by a writing duly executed under its corporate seal and filed in the office of the secretary of state of this State accept the provisions of*

the Code." Did the West Virginia court mean to say that this "writing duly executed" was a futility for the purpose for which it was executed, viz., "*to do business as such corporation in the State of West Virginia, as lessee of the works, property, and franchises of the Chesapeake and Ohio Railway Company?*"

The West Virginia court treats the transfer of the rights and powers of the C. & O. Railway Co. to the N. N. & M. V. Co. as complete and effectual for every purpose, save that of depriving the latter company of the constitutional right to resort to the Federal court.

The Court of Appeals holds that the decisions of the courts of Virginia "amount to nothing more than the affirmation of the foregoing doctrine"—*i. e.*, that a party engaged in the wrongful operation of a road cannot defend on the ground of *ultra vires* (Rec., p. 114). But when the C. & O. had retired from railroad operation altogether, how can it be said to be engaged in operating *ultra vires* the road of another company? The Court of Appeals expressly states that "in contemplation of law" the Kentucky road "was operated at the time" by the lawful owner thereof.

"*Notwithstanding the immediate and active, but unauthorized and unconfirmed agency of the Connecticut corporation therein.*"

Whence, then, is the liability derived of the C. & O. R. R., which was not the lawful owner of the E., L. & B. S. R. R., and not the immediate and active, authorized or unauthorized, agent for the operation thereof?

Whatever may be the rule in some other jurisdictions as to the need of an express exemption of the lessor's liability in the statute authorizing the lease, there is no such rule in Virginia.

"*The lease of a railroad under due authority of law effects a transfer of rights and liabilities in its management, so that the corporation owning the railroad is discharged from responsibility for the lessee's torts*" (*Virginia Midland R. R. Co. vs. Washington*, 86 Va., 365).

Moreover, in ratifying a lease *which expressly imposed all the liabilities for the management of the road upon the lessee* the legislature of Virginia, in effect, enacted a statute exempting the lessor. The Kentucky rule is the same. The C., O. & S. W. Company and N. N. & M. V. Company were made defendants to an action in which the following decision was rendered:

> "*The C., O. & S. W. R. R. Co. filed a general demurrer to the petition, which was sustained, and we think properly done, because though it is alleged to be the owner, the N. N. & M. V. Co. having the exclusive control and management of the road, and the locomotive by which the injury was done being at the time operated by its employés, is alone answerable in damages to the plaintiff*" (*Harper vs. N. N. & M. V. Co.*, 90 Ky., 360).

As shown by the record, the lease of the C., O. & S. W. railroad was cotemporaneous with that of the E., L. & B. S. R. R. to the N. N. & M. V. Company (Rec., p. 61). In the case of *Roseberry's Adm'r vs. N. N. & M. V. Company*, the action, based on an accident which occurred the 1st day of August, 1891, in Carter county, Kentucky, was brought against the lessee, the *N. N. & M. V. Co.* Other actions sustained against this corporation in Kentucky are *N. N. & M. V. Co. vs. Carrol*, 31 S. W., 132; *N. N. & M. V. Co. vs. Mitchell*, 33 *id.*, 622; *N. N. & M. V. Co. vs. Hazelip*, 34 *id.*, 904; *N. N. & M. V. Co. vs. Mendel*, *id.*, 1081. *Gurley vs. Railroad*, 91 Tenn., 487, is an action brought in the State of Tennessee against the N. N. & M. V. Company, necessarily as the lessee of the C., O. & S. W. R. R. Co. If the authorized expositors of law in these Commonwealths be allowed any weight whatever, the leases of the E., L. & B. S. Company in January, 1886, and of the C. & O. Railway Company some five months thereafter to the C. & O. Railway Company were leases by legitimate lessors to a legitimate lessee. If the legislature itself cannot legalize, where shall legality be found? All the modes by which a lease may be validated exist in this case—charter power, general law,

special law—and the learned Court of Appeals would seem to hold no one of them nor all of them together to be sufficient to give validity, while also holding the illegal and void verbal direction of a single individual, most properly revoked by him (if he gave it in the sense supposed), to be adequate to override all the recorded laws and sealed agreements shown in this record.

The very last proof offered by the plaintiffs in rebuttal is in these words :

The plaintiffs' counsel ask the question :

"Q. The Chesapeake and Ohio railway runs between Huntington and Richmond, does it not? A. Yes, sir.

"Q. What company operated that in 1886? A. The Newport News and Mississippi Valley Company, I suppose.

"Q. *The management of the whole road from Richmond to Lexington was the same, was it not?* A. *Yes, sir. I suppose it was.*

"Q. *It was all known as the Newport News and Mississippi Co.?* A. *Yes, sir; that was my understanding of it*" (Rec., p. 86).

And with this the plaintiffs closed their case.

It may not be improper to cite from one of the volumes in the library of this court an act of the General Assembly of Virginia entitled "An act to enable the C. & O. Railway Co. to acquire an interest in extensions or additions to its system of railroads outside the State," approved February 13, 1890, whereby the Chesapeake and Ohio Railway Company "*is authorized to acquire, or acquire an interest in, railroads outside this State, forming extensions or additions to said system, as now or hereafter existing by purchase, consolidation, merger, lease, stock-ownership, or otherwise, and to create deeds of trust,*" &c. (Acts of Assembly of 1890, p. 322).

Prior to this act there was no legislation of the State of Virginia under which the C. & O. Railway Co. could become lessor of such extensions or additions or lawfully operate the same. It is immaterial to the controversy here

whether or not action has been taken under this act of assembly.

VII.

One company can only become responsible for the default of another by express agreement.

There can be no pretense that the C. & O. railway made an express contract to carry the plaintiff over the E., L. & B. S. road. Indeed, the plaintiffs are not suing on a contract express or implied.

The plaintiffs proved the time-table published in the Louisville *Courier Journal* of November 13, 1886, under the caption Chesapeake and Ohio railway, for trains from Louisville via C. & O. for Washington, Baltimore, Philadelphia, New York, and the East, advising Philadelphia passengers that they can remain in sleepers until 7 a. m. It advertises solid trains between Louisville and Washington city, *and went into effect September 30, 1884;* ticket office, 225 Fourth avenue.

In the same paper is the further advertisement:

Newport News and Mississippi Valley Company.

Western Division, Chesapeake, Ohio and Southwestern R. R.

In effect June 6, 1886.

Solid trains and Pullman sleepers for Memphis and New Orleans.

Ticket office, 225 Fourth avenue.

This also was proved by plaintiffs as part of their case (Rec., pp. 20, 21).

Another advertisement was shown in the Washington *Post* of November 15, 1886, with the caption Chesapeake

and Ohio railway, and advertising solid trainsto Louisville and Pullman service to Cincinnati and St. Louis. Twelve days afterwards, viz., on November 27, 1886, there appeared in the same paper an advertisement with the caption:

Chesapeake and Ohio Route.

Newport News and Mississippi Valley Company.

and showing a change of schedule.

Another was shown in the Louisville *Courier Journal* under the caption:

Newport News and Mississippi Valley Company.

Chesapeake and Ohio Route.

showing a change of schedule *which went into effect November 21, 1886*, and giving the times of trains, not only for Washington and the East, but for New Orleans and the South—*i. e.*, combining in one advertisement what had previously been published in two (*id.*, pp. 22, 23).

The same evidence would prove that the C. & O. railway operated not *only* the road between Lexington and the Big Sandy, but also the road between Lexington and Louisville, *which the plaintiffs prove was owned and operated by the Louisville and Nashville* (*id.*, p. 30). The same evidence would equally prove that the C. & O. railway operated the whole road from Washington to St. Louis and from Louisville to New York.

In the Washington *Evening Star* of February 17, 1900, under the caption Southern railway, will be found the following: "Sunset personally conducted Tourists' excursion; through sleeper on this train every Monday, Wednesday, and Friday *to San Francisco, without change.*" Does this obligate the Southern railway to be responsible for all the line of railway between the Potomac and the Pacific? Yet, we

may assume, the Southern railway is pushing the "sunset business" for all it is worth.

Immediately above, in the same advertisement, is published: "Extra drawing-room sleeper between New York, Washington, and New Orleans every Tuesday and Saturday." Is this an acknowledgment of responsibility for the entire distance by the Southern railway? This same Southern railway has an advertising trade-mark for the route between Washington and New Orleans, viz., the "Piedmont air line" (Rec., p. 54), but this does not mean that the whole route is operated by the same company. On the corner of Sixth street and Pennsylvania avenue is the office of the "Atlantic Coast line," which purports to sell tickets from New York to Florida, but the court will probably take judicial notice that one corporate management does not extend between these points, and that the words "Atlantic Coast line" constitute a trade-mark for the route.

It is shown that it was usual to make the arrangement for the advertisement of time-tables by the year, and to change them "when we change the schedules" (*id.*, p. 21). In the case of the trains going southwest a change had been made in the schedule on *June 6, 1886*, and immediately a new advertisement appeared, under the caption Newport News and Mississippi Valley Company. In the case of the trains going east no change had been made in the schedule *since September 30, 1884, nor was made until November 21, 1886*, and therefore no change was made in the advertisement until after the date last mentioned. Can it be contended that because the N. N. & M. V. Co. did not change the newspaper notice of the times of departing trains until they changed the times for their departure the Chesapeake and Ohio thereby acquired and assumed a liability which the advertisement, when inserted, did not impose? The proposition that an advertisement which did not import that the C. & O. railway operated the E., L. & B. S. R. R. while the C. & O. operated its own road did import this the instant

the C. & O. railway ceased to operate any road is difficult to grasp.

Instead of going to "Ticket office, 225 Fourth avenue," as directed, the plaintiff went to a scalper's to buy her ticket. Had she gone to the office to which she was directed and which her own proof shows to have been the office of the Newport News and Mississippi Valley Company *she would and could have bought only a Newport News and Mississippi Valley Company ticket.* This is shown, not only by the plaintiff's testimony (Rec., p. 46), but explicitly and in detail by the defendant (*id.*, pp. 66 and 67). The only ticket agent in Louisville for the sale of tickets over the line of road from Lexington, Kentucky, to Charlottesville, Virginia, was *the ticket agent of the Newport News and Mississippi Valley Company* (*id.*, p. 66). It was shown that it is "a very complicated matter to change an issue of tickets over railways" (*id.*, p. 56).

Therefore for a time after the lease of the C. & O. this overhauling had not been done. But, as is conclusively shown, prior to the plaintiff's injury it had been accomplished, and every ticket from Louisville to Washington *via* Huntington was a ticket issued by the Newport News and Mississippi Valley Company, Eastern division, via L. & N., N. N. & M. V., and V. M. (Virginia Midland) (*id.*, pp. 66 and 67). There is nothing to show when the ticket had been issued and sold which the plaintiff bought from the scalper; but the ticket (an exact copy of which is found between pages 52 and 53 of the record) imported no liability whatever on the part of the C. & O. Company for any part of the route in Kentucky, but *expressly disclaimed liability therefor.* If the ticket held out the C. & O. as not liable for the Kentucky road before there was any lease to the N. N. & M. V. Co., how could such lease cause the words disclaiming liability to import liability; or how can a scalper hold out a company as operating a road, by the sale of a ticket which is not sold at the time by any authorized agent, and

so hold out a company which the scalper knows does not so hold out itself? The scalper says that he called the whole road from Memphis to Washington Chesapeake and Ohio, although he knew the road from Charlottesville was a different road, and knew that in November, 1886, the road from Lexington to Huntington or Ashland was Newport News and Mississippi Valley (*id.*, p. 19).

"*By the first condition of the contract contained in the plaintiff's ticket the defendant is not responsible beyond its own line*" (*Mosher vs. St. Louis, &c., Co.*, 127 U. S., 395; S. P., 2 Redfield on Railways, § 201).

Surely when the defendant ceased to operate its own line it, all the less, became responsible for the lines of other companies, for which it no longer acted even as agent.

"They notified him (or her) that they acted only as agents for the carriers, whose route extended westward from Pittsburgh and not at all for themselves. *With this express disclaimer of personal liability, there is no possibility of implying an engagement*" (Strong, J., in *Penn. Co. vs. Swartzenberger*, 45 Pa. St., 214).

"Those tickets, though unconnected, indicated upon their face a separate service by three different roads. *All bore the name of the Eastern railroad.* That was necessary to indicate their source and to enable proper settlements to be made between the several connecting roads" (*Hartan vs. Eastern R. R. Co.*, 114 Mass., 47).

The plaintiff's ticket was a proclamation to her that the relation between the C. & O. Company and the E., L. & B. S. R. R. was that of independent companies, and, although at the time of the plaintiff's injury the two had come under the management of one lessee, this did not and could not make each lessor company answerable for the other, but simply made one lessee company answerable for both.

At the trial defendant's counsel offered to prove the custom of railroad companies to stamp tickets with their own corporate names for passage over the roads of other com-

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

panies by copies of tickets for passage over the line between Richmond and Washington, showing that this end of the line they were stamped Pennsylvania road and at the Richmond end R., F. & P. R. R. The court deemed the proof unnecessary, as the same was "matter of public knowledge" (*id.*, p. 54). As such matter of public knowledge, copies of these tickets are shown on the opposite page.

VIII.

Where a community of profit and loss does not exist no partnership exists.

As has been shown, the gravamen of the declaration is that on November 16, 1886, *the C. & O. Railway Company was operating a line of railway between Louisville and Washington.* No claim is made on the ground of any partnership existing between the Kentucky or Virginia companies, or on any ground save the one stated; but if such claim had been made the record shows it could not be sustained.

"Where there is no joint property, no joint fund, no joint losses, no joint profits, and no arrangement to share loss and profit, there is no partnership."

Irwin vs. Nashville, &c., Co., 92 Ill., 103.

In the case of the *Penn. R. R. vs. Jones* it was shown that a ticket issued by the Pennsylvania Company was sold in Baltimore on account of the Alexandria and Fredericksburg Company; that the employés of the roads between Philadelphia and Washington were paid from a pay car, whose brakeman and conductor wore the uniform of the Pennsylvania Company; that the general passenger agent and general manager of this company occupied similar positions in the roads between Philadelphia and Quantico; that newspaper advertisements called attention to the route

as the Great Pennsylvania Route; that the Pennsylvania road had paid consignees for goods destroyed in the collision which was the cause of action and been reimbursed by the receiver of the Alexandria and Fredericksburg Co., but none of these things showed the Pennsylvania Company to be "jointly interested in the running and management of said railroads"—*i. e.*, the three roads which divide up the short distance between Washington and Alexandria (155 U. S. 339, 345). *A fortiori*, this road could not have been held if the record showed that the Pennsylvania R. R. had gone out of business altogether—had, for example, been leased to the P., W. & B. R. R. instead of controlling it.

It is held in the same opinion that there was evidence going to show that the three companies which between them owned the short line of track between this city and Alexandria did manage and control it for their common use, and were "jointly interested in the running and management of said railroads."

But in the case at bar how can there be any pretense of partnership between any other company and the Chesapeake and Ohio, which had gone out of business altogether? How could the Chesapeake and Ohio have any joint property, joint fund, or arrangement to share profit or loss with the E., L. & B. S. Company when the N. N. & M. V. Company had leased all the property, had bargained to receive all the profits, and solemnly promised to sustain all the losses of both roads, and had so leased, bargained, and promised with the assent of four Commonwealths?

There was not therefore, there could not have been, the partnership relation out of which might be implied a promise on the part of the C. & O. Railway Company to be answerable for the default of the E., L. & B. S. Company. Therefore, once more, "*in the absence of a special agreement to that effect such liability will not attach, and the agreement will not be inferred from doubtful expressions or loose language, but only from clear and satisfactory evidence*" (*Myrick vs. Michigan Central R. R. Co.*, 107 U. S., 107).

IX.

The circular and map called folder offered in evidence by plaintiffs does not create nor tend to create a special agreement of one of the lessor companies to be answerable for the default of the other.

The circular and map known as folder offered in evidence by plaintiffs is dated November 21, 1886. It exactly coincides in date with the change of schedule, which caused the change of caption from C. & O. railway to Newport News and Mississippi Valley Company, in the newspaper advertisement of trains between Louisville and Washington; a change of caption, it seems to be contended, which would shift the right of action from one against the former company to one against the latter. Can it be believed that Mr. Huntington, on the very day that he directed the publication in the papers, which by the plaintiffs' contention asserted the responsibility of the Newport News and Mississippi Valley Company, directed *eo instanti* a folder to be distributed on the trains and at the stations, which took it all back? The folder calls itself in bold letters on the back, "Time-table, C. & O.—*Newport News and Mississippi Valley Company*"—and on the next side, "Chesapeake and Ohio route, the grand scenic route to the sea."

On another page we read, "West and South from Washington," and in small capitals, "Chesapeake and Ohio R'y;" on another, "West and South from New York," and again in small capitals, "Chesapeake and Ohio R'y," and on another, "Chesapeake and Ohio R'y" in small capitals, and "Old Dominion steamships." Another page advertises the Chesapeake and Ohio as the "only route to St. Louis and the West," and does this under the caption, "*Newport News and Mississippi Valley Co.*, Western division, Chesa-

peake and Ohio route." Another page has the time-table eastward from Louisville and Cincinnati, and directs the traveler to call for information "at the principal ticket offices of the Newport News and Mississippi Valley Company." The next page contains the time-table by the C. & O. route from Washington to New Orleans. A final page advertises "a new Transatlantic steamship line, operated by the *Newport News and Mississippi Valley Co.*, Chesapeake and Ohio route, between Newport News, Virginia, and Liverpool, England." On the inside of the folder is a map entitled "Map of the Chesapeake and Ohio route," which is indicated by a conspicuously broad line, extending from Newport News via Louisville and Memphis to New Orleans, and thence to El Paso, Texas. In this folder the word "company" is only used in connection with the words Newport News and Mississippi Valley. The only company by which any line is said to be operated is the Newport News and Mississippi Valley Company. This time-table and folder was given to the public by the general passenger agent, the general traffic manager, and the second vice-president of the Newport News and Mississippi Valley Company.

"Question by plaintiffs' counsel: Well, now, this publication advertises on the back that this route is the C. & O. route, does it not? A. Yes, sir.

"Q. *It shows the road that under this lease was run by the Newport News and Mississippi Valley Co., does it not?* A. I think so. * * * The trade-mark, as it were, of the system was the C. & O. route."

The plaintiffs attach great importance to the fact that the road from Newport News to Louisville is marked "C. & O." But if there be anything in the adage "He who proves too much proves nothing," this does not amount to much. It would prove that the road from Lexington to Louisville was C. & O., and the plaintiffs themselves prove it never was. The line from Louisville to Memphis is marked C.,

O. & S. W. Does this prove that the C., O. & S. W. had not been leased to the N. N. & M. V. Company, and that the C., O. & S. W. continued to be liable therefor? The highest court in Kentucky, as has been shown, says that only the N. N. & M. V. Co. was responsible therefor. Such notices, time-tables, and maps are not designed to denote or define contract obligations, but are published to inform the traveler where and by what routes he may obtain passage to the end of the earth if he so desires.

"*Of the thousand railroads in this country, there is not one, perhaps, which does not publish a like notice, and yet no one of them ever supposed that such notices constituted contracts of the character and responsibilities claimed by the plaintiff, nor are passengers deceived by such notices.*"

Hood vs. N. Y. & N. H. R. R. Co., 22 Conn., 10.

A map quite as extensive and elaborate was exhibited in the case of *Penn. R. R. Co. vs. Jones*, but it was powerless to establish the relation of partner between the Pennsylvania R. R. and the other companies. In the case at bar it is sought to establish by a map issued by the officers of the N. N. & M. V. Company the relation of partner with the C. & O. Company, which at the time was not receiving any profits from any road, and was by legalized contract exempt from liability for losses upon its own.

X.

The ownership by one company of a majority of the stock in another does not create a responsibility in the first for the torts of the other; still less does the ownership by a single individual in the first company of a majority of the stock in the second create such responsibility in the first for the second.

Some importance seems to be attached to the ownership or control by Mr. Huntington of a majority of the stock of the E., L. & B. S. Co. But had the Chesapeake and Ohio itself owned a majority of the stock of the E., L. & B. S. R. R. the former company could not have been sued for the negligent operation of the latter. The mere fact that the president of the C. & O. R'y Co. controlled a majority of the stock of the E., L. & B. S. Co., and by the vote of his stock, would not be the control or operation of it by the C. & O. R'y Co.

If a judgment is rendered against the former road, the man who owns a majority of the stock suffers the consequences along with the other stockholders of that road, but it were hardly just for the other stockholders of the C. & O. Company, who own none of the stock in the E., L. & B. S. Company and whose votes cannot control it, to suffer also.

"*Where the rights and powers of a railroad company are those of a stockholder only in a connecting railroad*, the railroad company on account of being a stockholder is not liable for the negligence of the connecting railroad."

Atchison, &c., Co. vs. Cochran, 43 Kan., 225.
Atchison, &c., Co. vs. Davis, 34 *id.*, 209.

Upon the question whether the Missouri Pacific Co. did or did not control the St. Louis, Iron Mountain, &c., Co., this court said :

"The two roads are substantially owned by the same person and operated in the same interest, but that of the St. Louis, Iron Mountain and Southern Company is in no legal sense controlled by the Missouri Pacific. * * * *The Missouri Pacific Co. has bought the stock of the St. Louis, &c., Company, and has effected a satisfactory election of directors, but this is all. It has all the advantages of a control of the company, but the company alone controls its road. * * * Its rights and its powers are those of a stockholder only.*"

Pullman Car Co. vs. Missouri Pacific Co., 115 U. S., 596, 597.

S. P., *York, &c.*, [illegible] *vs. Winans*, 17 How., 30.

In the case of *Penn. Co. vs. Jones* it was shown that the Pennsylvania R. R. owned "60,852 shares of the B. & P. Company's stock and 217,819 shares of the stock of the P., W. & B. Company." But this circumstance did not show that the former company operated the two latter.

The fact, therefore, of the ownership and control of stock in the E., L. & B. S. Company by the president of the C. & O. Company would not make the latter responsible for the former had there never been a lease. Still less can it have such effect when with express legislative sanction the C. & O. Company has been released from the obligation to operate any road, and from responsibility for the management of its own.

The construction of the E., L. & B. S. R. R. to be an outlet for the C. & O. railway did not involve a special promise by the latter company to be answerable for the default of the former.

Some significance seems to be attached to the fact that the E., L. & B. S. R. R. is said to have been constructed for the purpose of forming a through route to Louisville for the C. & O. But this most natural and reasonable motive no more made it a part of the C. & O. railway than of the L. & N. R. R. A public highway is always constructed to be an outlet from one point and an inlet to some other. It would be very remarkable in this day if a railroad were constructed with no view to forming a through route for some

other. At an earlier date such was the avowed object of one of the first railroad companies incorporated in this country. In the act of the General Assembly of Virginia incorporating the Richmond and Fredericksburg R. R., passed February 25, 1834, it is recited: "The railroad authorized by this act will form a part of the main northern and southern route between Richmond and Washington" (*R. R. Co. vs. Louisa, &c., Co.*, 13 How., 80). No one took this for an assertion that the whole route would be under the corporate control of the company named, still less that the connection north of Washington or south of Richmond would be the same legal entity. For many years before the late war, at the intersection of O and Sixth streets S. W., there was a wharf "known from the uses to which it was devoted as that of the Richmond, Fredericksburg and Potomac R. R. Company" (brief of Mr. John Selden in *U. S. vs. Morris*, p. 5), but the line of the company did not then extend further north than Fredericksburg nor now than Quantico. Certainly this motive for construction would not show or tend to show that the C. & O. Railway Co. was "jointly interested in the running and management" of the E., L. & B. S. R. R. before the lease, *still less after the lease*.

XI.

The Supreme Court of the District of Columbia has joined other courts in holding valid the lease by the C. & O. R'y Co. to the N. N. & M. V. Co.

The Supreme Court of the District of Columbia has united with the courts of Virginia and West Virginia in recognition of the valid transfer to the N. N. & M. V. Co. of the power to control and operate the railroad of the C. & O. R'y Co. On April 8, 1887, P. E. Dye filed his declaration (at law, No. 27694), in the Supreme Court of the District of Columbia,

against the C. & O. R. R., the R. & D. R. R., and the Virginia Midland R. R., alleging, so far as the first-mentioned defendant was concerned, that "the C. & O. R. R. Co. was the owner of a line of railway extending from the said town of Charlottesville westward to and beyond the station on its said line at Alleghany, and known as 'Alleghany station.'" It is stated that the plaintiff "applied at the office of the said defendant, The C. & O. R. R. Co., in the said city of Washington, for a round-trip ticket from the said city of Washington to the said springs (Sweet Chalybeate); and thereupon the agents of the defendants then and there sold to the plaintiff a ticket for the passage of himself over the said line of railroad on a solid and continuous train, by way of the said town of Charlottesville, to the said station of Alleghany." The return of the marshal is as follows:

"Served copies of the declaration, notice to plead, affidavit, and this summons on the defendant, The Chesapeake and Ohio Railway Company, by service on Frank Trigg, general northeast passenger agent, and by leaving a copy with him for said company at its place of business, No. 513 Penn. Ave. N. W., Washington city, D. C., May 13, 1887.

"A. A. Wilson, *Marshal*."

The C. & O. R'y Co. pleaded to the jurisdiction of the court on the ground "that at the time of the alleged service of the summons in this case, to wit, May 13, 1887, Frank Trigg, the person on whom such service purports to have been made, was not at such time the agent of the said defendant or person conducting its business," and that the C. & O. R'y Co. "was not at the time of the alleged service of process, to wit, May 13, 1887, doing business within the District of Columbia." These pleas, like those in the case at bar, were unverified. They were filed by the same attorney. The plaintiff joined issue on these pleas, and filed note of issue. Testimony was taken tending to show that at the time of this service the line of the C. & O. R'y had been leased to the N. N. & M. V. Co., and that the lines of

the latter company extended from Newport News and Old Point Comfort to Lexington, Kentucky. The issue as to the C. & O. R. R. Co. was concluded by the following judgment of May 9, 1888, which in effect decided that the said Frank Trigg was the agent, *not of the C. & O. Ry Co., but of the N. N. & M. V. Co.*, at the date of service:

"PELEG DYE, *Plaintiff*, *vs.* "THE CHESAPEAKE AND OHIO R. R. CO., *Defendant*.	At Law. No. 27694.

"Now comes here as well the plaintiff, by his attorneys, Messrs. Shellabarger & Wilson, as the defendant, by its attorney, Mr. Willoughby, and, waiving a jury, submit this case to this court, the defendant's plea to the jurisdiction of the court and the plaintiff's joinder of issue thereon. Whereupon, *after hearing the evidence offered, the court finds said issue for the defendant.* Therefore it is considered that the marshal's return of service on the defendant by service on Frank Trigg, agent, on April 11, 1887, and April 13, 1887, be, and the same are hereby, set aside and for nothing held, at the plaintiff's costs.

"Appeal by plaintiff."

But on July 13, 1888, the able attorneys of the plaintiff filed a stipulation dismissing the appeal "taken by the above plaintiff from the decision of the court in special term, holding that the above-named defendant, The Chesapeake and Ohio Railway Company, is not in court." The judgment above cited stands as the final judgment of the Supreme Court of the District of Columbia.

XII.

The continuation in office by the lessee of certain existing officers and agents of the leased properties until further notice, as shown by Exhibits H. W. F. 1 and 2 (Rec., pp. 61 and 62), is not an evidence of invalidity or fraud.

Some significance seems to be attached to the fact that upon the leases to the N. N. & M. V. Company the subordinate employés of the lessor companies were not forthwith changed by the lessee company. The present Secretary of the Treasury, in an article on civil-service reform, uses this language:

"Suppose that when I resigned the presidency of the bank to come here my successor had discharged the cashier, the tellers, the clerks, many of whom had been with the institution 15 or 20 years, to make places for other men who were entirely without experience, &c. The whole concern would have been turned upside down."

XIII.

Supposed Implications Relied upon by the Plaintiffs to Countervail Statutes and Sealed Agreements.

As heretofore shown, the instant the lease to the N. N. & M. V. Co. went into effect this company published the fact that it had entered upon the operation of the E., L. & B. S. R. R., and announced the new officers of the new company. The general counsel of the new company (who for the first time became such of any road operated in Virginia) was announced to be Charles H. Tweed, of New York (*id.*, p. 62). He had previously been Mr. Huntington's lawyer, but not the lawyer of the C. & O. (*id.*, p. 47), as by an inadvertence he is stated in the opinion to have been (*id.*, p. 116). Mr. Huntington had at his office in

New York paper with the caption *C. & O.*, of which road he had been president. On a piece of this paper Mr. Tweed, the general counsel of the N. N. & M. V. Co., wrote to ask if Dr. Clymer might make an examination of Mrs. Howard. Plaintiff's counsel ask, "Is there not apparently a recognition of liability on the part of the C. & O. Railway Co?" A. (by Mr. Wickham:) "*I should say not, sir. The mere fact that it is headed "C. & O. Railway Company" I should not consider an admission in view of what I know to be the legal relations between the companies*" (*id.*, pp. 47, 48). Dr. Clymer was sent to examine Mrs. Howard, and made two reports on the subject of her injuries to Henry Hill Anderson, 35 Wall street, New York. Neither Mr. Anderson nor his firm had any connection at any time with the C. & O. Railway Company. The services of this eminent physician were, of course, invoked to ascertain the nature and extent of the plaintiff's corporal injuries and not the nature and extent of corporate liabilities. He states at the outset of his report the fact that the plaintiff attributed her injury to an accident on the C. & O. railway (as to which he necessarily knew nothing in the world), and then gives his opinion as to her injury. The medical opinion, which he was peculiarly competent to give, was excluded by the court, and the legal inference as to the corporation liable, which he was wholly incompetent to give, was admitted by the court. Dr. Clymer had no business connection with the C. & O. or any other railroad corporation. He "*was only concerned with the medical aspects of the case.*" Shortly before the last trial the plaintiff called on Dr. Clymer to inquire as to Mr. Anderson. Witness told her that Mr. Anderson was dead, "but that his firm was in existence—Howland & Anderson—and that he had a son in the firm, and also his former partner, Judge Howland, and if she wanted any information she could get it there." Under the impression, which he himself ascribes to the plaintiff, that she was a passenger on the C. & O. railroad, Dr. Clymer so entered the fact on his books, and

also that he was paid for his services by the C. & O. Company (*id.*, p. 49).

But this is simply an honest gentleman's mistake. The check which was received by him in payment for his services in this case was drawn by the *Newport News and Mississippi Valley Company on the National Bank of Commerce, in New York, and is signed by I. E. Gates* (*id.*, p. 73), who never had any official connection with a road in Virginia until he was announced as treasurer by the N. N. & M. V. Co. (*id.*, p. 62). The entry in the book is a manifest error. The payment by the N. N. & M. V. Company is obvious truth. *It would seem to be argued, that the truth is concluded by the error and not the error by the truth.*

In order to prove that the C. & O. and the N. N. & M. V. Co.—*i. e.*, the lessor and lessee—were the same, the plaintiff's counsel inquired as to the present officials of Dr. Brock (who is a physician now in the employ of the C. & O. and formerly of the N. N. & M. V. Co.). The witness, over objection and testifying from presumption only, says he presumes there never was any change, and he presumes Mr. Huntington is still president thereof. This is, of course, another honest gentleman's mistake. It was not his business to know and he did not know. If Mr. Huntington were still president, the supersedeas bond would have the wrong name on it. Mr. Huntington has not been president of the C. & O. since the C. & O. came out of the hands of the receiver, and Mr. Ingalls has been ever since (*id.*, p. 54).

Are the statutes of four Commonwealths and solemn instruments under seal to be set at naught because an officer of the lessee company writes a note upon a slip of paper belonging to the former president of the lessor company, or because two eminent physicians labor under erroneous impressions as to facts in respect of which it was no part of their duty to be informed?

XIV.

Twentieth Assignment of Error.

Not only did the plaintiffs bring their action against the wrong defendant, but they assert the right to do so by service upon one who was not the agent of the defendant, and when the defendant had no agent in this District and was not conducting business therein.

Where a remedy is statutory only, the jurisdiction to enforce it is strictly limited by the statute.

It cannot possibly detract from the respect due to this objection of want of jurisdiction, that it was promptly brought to the attention of the court within less than a month after plaintiff's original declaration was filed and nearly three years before the amended declaration was filed. The defendant brought to the attention of the court and of the plaintiff's counsel that it was a foreign corporation, and that the courts of Virginia and West Virginia, having jurisdiction so to do, had made an order placing the property of the defendant in the hands of a receiver, and that at the time of the alleged service of the summons in this case, viz., November 14, 1887, the person on whom such service purports to have been made was not the agent of the defendant; that the defendant "was not at the time doing business in the District of Columbia;" as, indeed, had been decided to be the case before the defendant company went into the hands of a receiver.

"It has been held that however conclusive the return of service should be regarded as to the *time, place, and manner* thereof, it should be treated as only *prima facie evidence of the fact of agency*" (*Heath vs. Missouri, &c., Co.*, 83 Mo., 617, 624; 6 Thomp. Corp., § 7507). Bearing in mind "the general rule that agency cannot be proved by the mere unsworn declara-

tions of the agents" (*id.*, § 7506), it were an even more dangerous doctrine if the fact of agency could be conclusively created by the mere *ipse dixit* of the officer making the return.

We do not have to go to other jurisdictions for authority. In the case already cited the return of the marshal alleging service upon the same defendant was not conclusive, but was set aside "and for nothing held."

When the court has not jurisdiction of the cause, the whole proceeding is *coram non judice*, and "jurisdiction of the cause is the power over the subject-matter given by the laws of the sovereignty in which the tribunal exists." In the absence of this, what is done by a court "must be considered as an inadvertent assumption of judicial power not granted by law" and a nullity in consequence (*Fithian vs. Monks*, 43 Mo., 522).

In the case at bar objection is made on account of want of jurisdiction to hear and determine the cause. *If this court is now satisfied that the trial court was without jurisdiction to proceed to judgment, it would be error to suffer it to do so, even though the question of jurisdiction had not been raised at all.*

It were indeed a monstrous proposition that a judge may himself see that he has no rightful power to determine a cause, and yet have no power to avert judgment because the matter has not been properly brought to his attention.

"*Illegality in the service of process by which jurisdiction is to be obtained is not waived by the special appearance of the defendant to move that the service be set aside; nor after such motion is denied by his answering to the merits. Such illegality is considered as waived only when he, without having insisted upon it, pleads in the first instance to the merits*" (*Harkness vs. Hyde*, 98 U. S., 476). "*He is not considered as abandoning his objection because he does not submit to further proceedings without contestation.*" (Field, J., *id.*, p. 479.)

Now, in this District it is only "*in actions against foreign corporations doing business in the District*" that there is any jurisdiction to try cases against them, which, in the instance mentioned, is obtained "*by service on the agent of such corporation or person conducting its business.*" No such agent was served, and, what is more important, there was none to be served. The defendant company was not conducting business anywhere. The premises from which jurisdiction is derived were wholly non-extant.

"Statutes of this kind are not regarded as directory, but as mandatory and exclusive" (Thomp. on Corps., § 7503).

"When a State statute prescribes a particular method of serving mesne process, that method must be followed; and this rule is especially exacting in reference to corporations" (*Amy vs. Watertown*, 130 U. S., 302).

"The charter requires service on the mayor of the city. No such service was made. There was no mayor in service at the time. The last mayor had resigned and his resignation had taken effect. Service on him was of no more avail than service on an entire stranger. * * * The service of process in the present case was ineffective and void" (*id.*, pp. 302, 309, 315, 318).

"*The remedy is statutory only, and every court which takes jurisdiction for its enforcement is limited in its powers by the statute under which alone it can act*" (Waite, C. J., in *East Tenn., Va. & Ga. R. R. Co. vs. South. Tel. Co.*, 112 U. S., 310; S. P., *Galpin vs. Page*, 18 Wall., 371).

In the case of another foreign corporation, it was held: "Inasmuch as it has no place of business and no business agent conducting its affairs in this District, it is not capable of being found within the jurisdiction of this court" (*Lathrop vs. Union Pacific R. R. Co.*, 1 MacArthur, 238).

"*Where the subject-matter of the suit is without the jurisdiction of the court, consent of parties cannot confer such jurisdiction; much less would it be conferred by mispleading*" (*Jeffries vs. Harbin*, 20 Ala., 388; S. P., *Wheelock vs. Lee*, 74 N. Y., 498).

Hence in such case the objection that the court below had no jurisdiction may be raised for the first time in the appellate court (*Cerro Gordo County vs. Wright County*, 59 Iowa, 485; *Brondberg vs. Babbett*, 14 Neb., 517).

The eleventh section of the judiciary act contains the provision that "no civil suit shall be brought against an inhabitant of the United States by any original process in any other district than that whereof he is an inhabitant, or in which he may be found at the time of serving the writ." * * * "*Nazro appeared specially in the district court and by motion, instead of by plea, objected to the jurisdiction of the court. The objection was overruled.* * * * He then answered and defended, and judgment went against him, to reverse which he brings this writ of error. I am of opinion that, though a *plea* to the jurisdiction would have been more regular, yet under section 5 of the act of June 1, 1872, the ruling of the district court on the motion is part of the record, and may be reviewed here the same as if a plea to the jurisdiction had been overruled. *I am also of opinion that the ruling on the motion to the jurisdiction was not waived by afterwards pleading to the merits, and that it is available to the defendant on error. Accordingly the judgment below must be reversed, and the district court directed to dismiss the proceedings*" (Miller, J., in *Nazro vs. Cragin*, 3 Dill., 475). Our rules provide that the order of pleading shall be: "(1) To the jurisdiction; (2) to the disability of the plaintiff, abatement; (3) to the disability of the defendant, abatement; (4) to the declaration; (5) in bar." It is added, "All pleas in *abatement* shall be accompanied by an affidavit of the defendant, his agent, &c." (Rules, p. 15). One might reasonably interpret this to mean all pleas to the disability of the plaintiff or defendant shall be so verified. Especially the same counsel, who, in the Dye case, had filed the plea to the jurisdiction, also unverified. The plea is now established by verifying facts; by proof, *not ex parte*, but in open court.

Jurisdiction is sought to be obtained of the defendant company by service on another party equally incapable of being sued.

On the 27th of October, 1887, by decrees of the circuit court of Henrico county, Virginia, and of the circuit court of Kanawha county, West Virginia, Williams C. Wickham was appointed receiver of the C. & O. Co. upon the prayer of a bill to which the C. & O. Co. and the N. N. & M. V. Co. were made parties defendant. The said receiver was directed "to take possession of all and singular the premises, property, and franchises whereof he is hereby appointed receiver." "It is further ordered that the said defendants and all other persons whatsoever be, and they are hereby, strictly commanded peacefully to deliver up and surrender to said receiver all and singular the premises whereof he is hereby appointed receiver" (Rec., p. 29 *et seq*).

Over and over again it has been decided by this court that a receiver thus appointed could only be sued by leave of the court appointing him. The party upon whom process was served in the present case was in point of fact in the service of the receiver appointed by the decrees referred to—a party exempt from suit in this jurisdiction, without leave from the courts under whose decrees he was acting.

In 1854 Congress authorized the Alexandria and Washington R. R. Company to extend their railroad *into* the District of Columbia. The act of incorporation provided that in case of suit against the company "the service of process * * * may be made on * * * *any director of the company.*" In 1866 the Washington, Alexandria and Georgetown R. R. Co. succeeded to the chartered rights of the old A. & W. Co. The road, under its new name, was at the time of this act leased to two persons named Stevens and Phelps. "The portion of it within the District of Columbia, *by a decree of the Supreme Court of the District*, was placed in the possession of a receiver, and the whole road was worked on the joint account of the lessees on the Virginia side and

the receiver on the District side." The plaintiff sued the W., A. & G. R. Co. in the Supreme Court of the District, the marshal making return that he had "served copy of summons and declaration on J. S., *reputed to be* one of the directors of the company, the defendant." There was no denial that J. S. was such director.

The defendant company, it will be observed, was not a foreign corporation, so that the court had jurisdiction of the subject-matter, and service was had upon the party designated in the charter as the proper one for the purpose.

In the second place, the lease which was invoked was not one authorized by act of Congress or any other legislature, and therefore not one which could or should emancipate the lessor company from liability to suit. Third. It is the proof (17 Wall., 447), *acknowledged and adopted by the defendant in the request for instructions* (*id.*, p. 449), *that "the road was in the possession of the lessees and receiver, worked and conducted by them," and finally the receiver had been appointed not by the court of another jurisdiction, but by the court in which the action had been brought.* In this state of facts the court said: "The process was served on S., a director of the road, and this service was in conformity to law;" the lease relied on did "not change the relations of the original company to the public. In this case the possession was not exclusive, nor were the servants subject to the receiver's order alone; on the contrary, the road was run on the joint account of the lessees and receiver, and the servants employed and controlled by them jointly" (*Railroad Company vs. Brown*, 17 Wall., 449, 450, 451).

Substantially this and no more, in respect to the identical corporation, is reaffirmed in *R. R. Co. vs. Jones*. The sole question was whether the road was really in the hands of a receiver, or whether his dominion over the road was nominal only (*R. R. Co. vs. Jones*, 155 U. S., 350).

But unembarrassed by any question as to whether the possession of the receiver is or is not exclusive—a question

which cannot possibly arise under the decrees exhibited—there is no uncertainty as to the opinion of this court upon this point.

To an action brought against him as receiver of the Virginia Midland, &c., Co., John S. Barbour filed a plea to the jurisdiction, alleging, among other things, that, at the time of service of process on him, he was the receiver of all the property, rights, and franchises of said railroad company, by virtue of a decree of the circuit court of Alexandria, authorizing him to defend all actions brought against him as such receiver by the leave of said court, and averring that the plaintiff had not obtained leave of said court to bring and maintain said suit.

"*It is a general rule that before suit is brought against a receiver leave of the court by which he was appointed must be obtained* (*Davis vs. Gray*, 16 Wall., 203, and the cases there cited). * * * We do not perceive how the fact that the receiver, under the orders of the court, is doing the business usually done by a common carrier makes his case any exception to the rule under consideration. * * * We are of opinion that the Supreme Court of the District of Columbia had no jurisdiction to entertain a suit" (*Barton vs. Barbour*, 104 U. S., 128, 129, 130, 131).

It did not occur to this court to be an objection to the above plea that the receiver appointed by the circuit court of Alexandria was without power to appoint and discharge agents in this District.

By the third section of the act of Congress of March 3, 1887, 124 Stat., 552, c. 373, as corrected by the act of August 13, 1888, 25 Stat., 433, c. 866, it is provided that a receiver appointed by any court of the United States may be sued without such leave (*Texas & Pac. R. R. Co. vs. Cox*, 145 U. S., 603). But this, of course, is inapplicable to a receiver appointed by a State court (*Porter vs. Sabin*, 149 U. S., 479).

The consent of the appointing court must, under most

remedial systems, be averred and proved (5 Thomp. Corp., § 7128; High on Receivers, § 254; *Keen vs. Breckenridge, receiver*, 96 Ind., 69).

Where the State had seized a railroad for non-payment of its bonds and the receiver appointed by the court retained its employés in office, it was held *that such employés were not the agents of the railroad company for the purposes of service* (*Cherry vs. N. & S. R. R. Co.*, 59 Ga., 446).

"Where the public authority by a receiver is in possession of a railroad and conducting its operations, the agents and employés are no longer those of the company. *This is the rule where the receiver is in under a court of equity, and the like rule is applicable where the receiver is in under the executive. There is no difference in principle*" (*id.*, p. 447).

"Here the defendant, by the act of the law, has been deprived of the possession of the road and of all control over those engaged in operating it, and by like act the possession and control has been given to others. The defendant had not thereafter anything to do with operating the road" (*Metz vs. Buffalo, &c., R. R. Co.*, 58 N. Y., 66).

"The appointment of receivers for the Memphis & Charleston Railroad Company was by decree of a court of record and was an act of such notoriety as that all persons have constructive notice. *The fact that the plaintiff was a foreigner, and that he had no actual notice that the road was operated by receivers was immaterial*" (*Memphis & C. R. R. Co. vs. Hoechner*, 67 Fed. Rep., 459).

"A receiver appointed by a court of equity to hold, manage, and operate an insolvent railroad *is not the agent of the insolvent railroad corporation, and is not the substitute for the board of directors. * * * His acts are not the acts of the corporation, and his servants are not the agents and servants of the corporation*" (*id.*, p. 457; S. C., 31 U. S. App., 648).

The established rule is that where a railway company is in the hands of a receiver appointed by a court of equity the receiver cannot be sued at law without the permission of the appointing court (*Melendy vs. Barbour*, 78 Va., 544).

The court by which a receiver has been appointed ought

not to allow the receiver to be sued unless the petition for leave states a *prima facie* cause of action against him (*Jordan vs. Wills*, 3 Wood's C. C., p. 527).

"*The United States courts hold that the rule requiring the leave of court to bring an action against a receiver is not overcome by a State statute abrogating the rule or providing that certain classes of action may be brought without such consent*" (3 Wood's Railway Law, p. 1656; S. P., *id.*, 1658).

The receiver is not subject to the process of any other court than the one which appoints him (2 Redfield on Railways, p. 424).

"*Where the property of a railroad company is in the hands of a receiver and its road operated by him, service of process upon the agent of the receiver will give no jurisdiction over the company,*" (*Heath vs. M., K. & T. R. R. Co.*, 83 Mo., 618).

"*Service of process on an agent or employé of the receiver will not give jurisdiction over the corporation*" (20 Am. & Eng. Encyc., p. 355).

In the case at bar upon whom did the marshal serve the writ? Undoubtedly upon the servant of the receiver of the C. & O. R. R. *If we might assume, as the plaintiff evidently does, that service upon the receiver was service upon the road of which he was receiver, how on earth could it be service upon the road of which he was not receiver—viz., the road on which the accident occurred, the Kentucky road between the Big Sandy and Lexington? After the appointment of the receiver the Newport News & Mississippi Valley Company continued to operate the E., L. & B. S.* (Rec., p. 41). *It is not pretended that this road on which the accident occurred was delivered to the receiver. How, then, can it be brought into court by service upon him?*

When the present suit was instituted the trial court had no jurisdiction to try a case against the C. & O. Company, nor without leave of the courts of Virginia and West Virginia against the receiver of that company.

Of what use to solemnly decide that a foreign corporation could not be sued in the District, where it had no place of business nor agent, if jurisdiction may be acquired by service upon the agent of another party equally exempt from suit! Such an aspect of the law would exhibit the name of exemption and the reality of subjection. In the former decision of this case (11 App. D. C.), referring to the appointment of a receiver by the courts of Virginia and West Virginia, the Court of Appeals uses the language:

"The decrees of those courts could not operate a transfer of the property in the District of Columbia, and the receiver appointed by them had no authority that must be respected here."

There is no evidence that there was any "property of the defendant" in this District, unless the railroad tickets, which may be presumed to have been in the office, can be so considered. It is hard to understand why a receiver cannot designate an agent to act for him in this District. But, in any event, if the party served with process was not the agent of the receiver, then he must necessarily have been the agent of the N. N. & M. V. Company, as by the Supreme Court of this District was adjudicated to have been the relation of any agent at said office, after the lease and prior to the appointment of a receiver.

Had application been made to a Virginia court for leave to sue the receiver, it should not have been granted. The court should and would have said, "Your remedy is against the N. N. & M. V. Company and not against this insolvent company, which under our law was at the time discharged from all liability for the operation of any road. You have not a *prima facie* case against the C. & O. railway."

XV.

Twenty-first Assignment of Error.

After the appointment of a receiver the N. N. & M. V. Company continued to operate the E., L. & B. S. R. R., but severed from all connection with the C. & O. railway and under a wholly different president.

By an inadvertence, it is stated by the Court of Appeals that when the proceedings for the appointment of a receiver ended, "the defendant (the C. & O. railway) resumed control and operation of the roads in Virginia, West Virginia, and Kentucky, and has maintained the same ever since" (*id.*, p. 116). Waiving the want of proof that the C. & O. Co. ever assumed such control of the road in Kentucky, the proof, and the plaintiffs' proof, is that after the appointment of a receiver the N. N. & M. V. Co. "continued to operate the E., L. & B. S. R. R., under the lease from that road, until some time in 1892, I think" (*id.*, p. 41). The C. & O. Co. came out of the hands of a receiver in 1888 (*id.*, p. 59). When it came out of the hands of a receiver the president was M. E. Ingalls (*id.*, p. 54).

The defendant's witness W. U. Carr continued to run passenger trains for the N. N. & M. V. Company over the E., L. & B. S. line until April, 1891. The Louisville ticket agent did not cease to be ticket agent of the N. N. & M. V. Co. until "June, 1890" (*id.*, p. 66).

XVI.

Twenty-second Assignment of Error.

Not only did the plaintiffs sue the wrong company, not only did they bring their action against a defendant incapable of being sued in this District, and seek to sustain their action against the defendant by service on another party equally incapable of being sued, but they did so for a cause of action which they proved could not be sustained against the company on whose road the accident occurred.

Failure to anticipate an improbable danger is not negligence.

The court correctly told the jury that if they found from the evidence that the accident to the train on which the plaintiff was traveling resulted from a latent or secret (erroneously printed "*secure*") defect or flaw in the flange of a wheel on the Piedmont Air Line coach, which careful inspection could not have discovered before the accident, the plaintiff could not recover in this action, even if the train were that of the defendant. Now, the plaintiffs' evidence shows that the accident occurred under just these conditions—from the broken flange of a wheel, which was "a fresh break," and from no defect in the track, which was "a good piece of track" (Gillespie's testimony, Rec., p. 15). "I was satisfied at the time," says another witness, whose testimony the plaintiffs read in evidence, "it was a fresh break, and am still satisfied it was a fresh break." The road-bed at the point was "in perfect order," and the breaking of the wheel was *an unusual event* (Yarrington, *id.*). The defendant's proof corroborates this, with the further proof that the engine and cars were properly inspected, and that the broken flange was that of a car wheel on the Piedmont Air Line coach (*id.*, pp. 70, 71, 72). *To rebut anything which might possibly have been proved to the contrary, the*

plaintiffs' last witness states very distinctly that the accident resulted from "a broken flange on coach No. 779; it was a Piedmont Air Line coach;" was "a fresh break;" that appearances indicated "that break was just before the accident occurred," and that the witness saw the inspection of the cars at Lexington (Rec., pp. 85, 86). It is true two witnesses of the plaintiffs do say that they believe the accident was caused by reckless running, *but they both admit they were asleep when the accident occurred and were awakened by it* (Rec., pp. 16, 17). This did not justify the instruction to the jury that they were at liberty to find from the evidence, "by a preponderance of it," that the accident did so occur. One of these witnesses further states that, before the train left the yard at Louisville, he heard from the porter or sleeping-car conductor that something was the matter with the spring or wheel of the car. The learned court intimates that this was objectionable as hearsay, but, in consequence of not having been objected to, it is admissible as additional proof (Rec., p. 118). The reason the hearsay testimony would be inadmissible over objection is because it is intrinsically unreliable; so that the effect is that testimony which is intrinsically inadmissible because it is intrinsically unreliable can preponderate over other testimony which is intrinsically admissible because it is intrinsically reliable. The railroad agents on the train when it started were agents of the L. & N. That anything of the kind was known to the sleeping-car porter and not to the officials of the L. & N. is remarkable. The passengers on the train would come in for a share of criticism. This evidence, disproved and rebutted by the plaintiffs themselves, is deemed competent to sustain a vindictive verdict in the sum of $30,000, against a different road, which was at the time in the hands of a receiver appointed by the courts of Virginia and West Virginia.

XVII.

Twenty-third and Twenty-fourth Assignments of Error.

Not only did the plaintiffs bring their action against the wrong defendant by the wrong service, upon a cause of action which they themselves prove could not be maintained against the right company by the right service, but they do this after the female plaintiff had settled in full for any cause of action she might have.

On May 28, 1890, the defendant pleaded to the amended declaration the acquittance under seal executed by Mrs. Howard on November 24, 1886. The plaintiffs joined issue upon this plea, and have never made other answer thereto (Rec., pp. 7 and 8).

The acquittance in question has the caption "*Newport News and Mississippi Valley Company to Mrs. Laura P. Howard, Dr.*" It is audited and approved by the auditor and vice-president of the N. N. & M. V. Co. The language of the receipt is :

"*Received November 24th, 1886, of the Newport News and Mississippi Valley Company two hundred dollars in full satisfaction and discharge of all claims or causes of action to me accrued against them, their lessor or predecessor companies, and particularly of all claims or causes of action arising out of personal injuries received by me while a passenger on the cars of the company near Soldier station, Kentucky, which occurred on the night of 16th of November, 1886.*" This paper was proved in defence (*id.*, pp. 65 and 66).

In rebuttal, by the two last witnesses placed on the stand by the plaintiffs, evidence was offered intended to show that the female plaintiff signed this acquittance in the belief that the money she received was a free gift, and that she was betrayed into this belief by the representations of Dr. Brock.

One deposition was thereafter read by plaintiffs' counsel, but, with this exception, the plaintiffs closed their case with these two witnesses. In this testimony the plaintiff states that she first heard that the paper was a release of her right of action from her counsel, General Henkle, after suit had been brought, and that she supposed the paper was nothing "except a receipt for $200" (Rec., p. 84).

The plaintiff did not deny having executed the paper. The defendant's counsel moved the court to instruct the jury that if the plaintiff signed and delivered this release of her claim for damages, then parol testimony was inadmissible to contradict and vary the same, but the court refused to grant said motion; to which ruling of the court the defendant, by its counsel, duly excepted. Counsel for the defendant thereupon moved the court to strike out all the parol testimony of the plaintiffs seeking to vary or contradict the release signed by the female plaintiff. The court declined to grant said motion, and counsel for the defendant duly excepted to said ruling (Rec., p. 87). The court thereafter instructed the jury that if they should find that in consequence of Mrs. Howard's illness at the time "*it was a reasonable act upon her part to sign the paper without reading it, and for that reason she did not read it, but relied upon the representations of its contents made by Dr. Brock, and that the latter did not read it to Mrs. Howard, but stated to her that it was a receipt for $200, which he paid her at that time, and that she relied upon said statement and signed the release under the belief that it was a receipt only and did not know that it was a release until some time afterwards, then the said release was at the time she signed it and is now void as a release*" (*id.*, pp. 88 and 89). To this instruction the defendant's counsel duly excepted, as shown by the brackets around this part of the charge. It is said by the Court of Appeals (Rec., p. 120): "The foregoing evidence on the part of the plaintiff was offered without objection or exception." The defendant's counsel supposed the foregoing motions by counsel, rulings of the court, and

action of counsel thereupon to be both objection and exception. It will be observed that objection and exception were not taken on the ground of the incompetency of the witness to testify, in which case it might be said that, had the objection and exception been taken earlier, the testimony could have been supplied by other witnesses; but such evidence could not be received from any source. What possible harm could accrue to the plaintiff from hearing all she had to offer before moving to strike out so much thereof as was vulnerable to the objection? Our rules provide (p. 25, rule 54):

"*If a party desires to present for review in the Court of Appeals the rulings or instructions of the presiding justice for alleged errors of law, he must at the trial and before the jury retire to consider their verdict, except to such rulings or instructions.*"

The defendant's exceptions were taken at the trial and before the jury retired.

"Exceptions must be taken or the points reserved whilst the jury are at the bar" (*Barton vs. Forsyth*, 20 How., 533).

The door is not shut "whilst the jury are at the bar." The record shows that "before the jury retired to consider of their verdict this bill of exceptions was reduced to writing" (Rec., p. 93). This includes the motion made by defendant's counsel to the court "to instruct the jury that if the plaintiff signed and sealed the release of her claim for damages which has been given in evidence, then parol evidence is inadmissible to contradict or vary the same, and the jury should find for the defendant" (*id.*, p. 87).

"Objection being that the replication seeks, by the introduction of parol evidence, to put on *an instrument under seal* a construction differing from the import of that instrument," Tindal, C. J., said: "That is an objection which was esteemed fatal as early as the time of Lord Coke" (*Cocks vs. Nash*, 9 Bingh., 345; 7 Rob. Pr., 940).

How much more *fatal*, then, such attempt where there is no replication! The motion was made to strike out because the evidence in question had no probative force whatever to vary or explain the written instrument, and therefore the opposite party could not have obviated the objection at whatever time it might be made.

Where there has been no special objection a party is not precluded in an appellate court from "insisting upon the insufficiency of evidence, or of availing himself of radical defects in the instruments of evidence which could not be obviated by proof and which strike at the foundation of the plaintiffs' claim" (*Gillespie vs. Smith*, 29 Ill., 478).

Objections may be urged in the appellate court "which were not raised at the trial if they are such as could not have been obviated at the trial" (*Pepper vs. Haight*, 20 Barb., 437).

Our Married Woman's act is very nearly identical with that of Illinois. Mr. Trumbull, of that State, reported to the Senate the bill which was enacted into law for this District. In Illinois it was held, almost cotemporaneously with our own enactment, that "*the right of action accruing by reason of personal injuries received by a married woman from the negligence of a railroad company is property,*" *and therefore came* under the provisions of their act (*The Chicago, &c., R. R. vs. Dunn*, 52 Ill., 260). "*It was the separate property of the wife, acquired during coverture, and from a source other than her husband and she alone can control it.*" The "source other than her husband" is the statute of Illinois; hence the same court held the wife must sue alone (*Hennies vs. Vogel*, 66 *id.*, 401; *Chicago, &c., Co. vs. Dickson*, 67 *id.*, 122; S. P., *Berger vs. Jacob*, 21 Mich., 219; *Musselman vs. Galligher*, 32 Iowa, 387; *Rumsey vs. Lake*, 55 How. Pr., 340; *Ball vs. Bullard*, 52 Barb., 143). By sections 5130 and 5131 of the Revised Statutes of the State of Indiana (the domicil of the plaintiffs) the earnings and profits of any married woman are made her sole and separate property,

and she is entitled to "*bring and maintain an action in her own name against any person or body corporate for damages for any injury to her person or character, the same as if she were sole; and the money recovered shall be her separate property, and her husband in such case, shall not be liable for costs*" (Rec., p. 77). The foregoing sections were duly certified so as to be evidence in this cause. By the law of Kentucky, the State in which the accident occurred, "the wages and compensation of married women belong to them and not to their husbands (*id.*). When by statute the right to bring the action and the cause of action is vested in the wife to the exclusion of the husband, it is hard to see why the clear right should be forfeited by a change of forum. In the present case, by what right could the husband interfere in the settlement of a claim in which, under the laws of Indiana, to which both husband and wife owed allegiance, the husband could have no interest whatever? The trial justice was right, therefore, in overruling the objection of plaintiff's counsel to the proof of this release, which objection was upon the ground that the same "*could not in this jurisdiction operate to divest the right of the husband of the female plaintiff for which he is now suing*" (*id.*, p. 50). It is not against the policy of this District to enforce the rights acquired by Mrs. Howard under the law of her domicil.

"A married woman trading as a *feme sole*, may, under § 3 of the act of Congress of June 1, 1896, allowing her to trade as such and providing that her earnings shall be her sole and separate property, maintain an action for a libel published concerning her with reference to her business, without the joinder of her husband" (*Wills vs. Jones*, 13 App. Cas. D. C., 483). "The time would seem, therefore, to have arrived when the courts should no longer give these statutes (the married women's acts) a narrow or illiberal construction, such as they may have heretofore received" (*id.*, p. 495).

The plaintiff's original declaration affirms Mrs. Howard's capacity to contract by basing the cause of action on the

ground that the defendant *agreed and contracted* with her. If she had no power to contract, the whole cause of action fell to the ground. Both declarations affirm and admit that the wife, with the approval of her husband, appropriated to herself the emoluments of her office; or, in effect, that, with the acquiescence of her husband, she lived in this District as a *feme sole*.

The Court of Appeals criticises the language of the release in that it is a discharge of all claims or causes of action, not only against the N. N. & M. V. Company, but also against their lessors or predecessor companies, on the ground that this is a species of admission that lessor and lessee were equally involved; but in this case lessor and lessee were the E., L. & B. S. Co. and the N. N. & M. V. Co. The acquittance was evidently prepared in view of the distinction taken by Mr. Justice Brewer in *R. R. Co. vs. Curl*, 28 Kan., 622, and taken also in *Nugent vs. Boston, &c., R. R.*, 80 Me., 76, that in an authorized lease without any exemption clause, for an injury resulting from the negligent omission of some duty owed to the public, such as the proper construction of its road, station-houses, &c., the charter company cannot, in the absence of statutory exemption, discharge itself of legal responsibility, while, as Mr. Justice Brewer says:

> "*If the injury results from negligence in the handling of trains or in the omission of any statutory duty connected with the management of the road, matters in respect to which the lessor company could in the nature of things have no control, then the lessee company will alone be responsible.*"

This is the distinction recognized by plaintiff's witness. "Her" (Mrs. Howard's) "redress would have been against the E., L. & B. S. Co., possibly, as the owner of the road-bed, or against the N. N. & M. V. Co. for breach of its contractual relation or duty as common carrier" (Rec., p. 47).

XVIII.

"There was no evidence which could justify the submission of the issue of fraud by the court to the jury."

It is pertinent to inquire, Did this evidence, whether objected to or unobjected to, justify the submission of the issue of fraud, which was objected to and excepted to at the earliest possible moment?

In this relation it is to be noted that here, as elsewhere in this record, the documentary evidence is the strongest contradiction of the parol proof which is offered to subvert it. A medical gentleman has a paper which states on its face that the company involved is the N. N. & M. V. Company. How passing strange if, with such paper in his hand, he stated that he did not represent this company, but another company! The printed paper also shows on its face that it is "*in full compromise, satisfaction, and discharge of all claims or causes of action.*" What motive can be conceived for the wanton misstatement that the printed paper was nothing of the kind?

This receipt was printed as distinctly as it is in this record, and could not have been made thus legible with a view to deception. The ground on which it was originally expected to be overcome was the inability of a married woman to make a contract, as may be collected from the first opinion in this cause.

The plaintiff states that she was told by her counsel, General Henkle, that this "paper was a release of all her right of action against the C. & O. R. R." (*id.*, p. 84). No surprise was manifested by this gentleman in respect to the extent of the acquittance. His whole labor was to show that it was a settlement with, and therefore a recognition of liability by, the C. & O. railway.

In the examination of Mr. Wickham (in 1893) General Henkle asked:

"Q. Do you know that the C. & O. Railway Company, by the authority of Mr. Huntington, made any offer of settlement of this matter? A. I think not. I remember very distinctly *that as general solicitor of the N. N. & M. V. Company I directed the chief surgeon of the company, Dr. Brock, to see her in Washington. He did see her and paid her $200 as a settlement of her claim; which I vouchered*" (*id.*, p. 48).

If it was intended to claim that any fraud was practiced on the plaintiff to obtain this settlement, it should have been then and there asserted, and this would have been a delay to do so, which had continued from May 28, 1890.

Dr. Brock was on the train, upon which the passengers continued their voyage, and made an examination of the plaintiff's injuries, which he supposed to be slight. A few days afterwards in Washington "Mr. Frank Trigg called upon plaintiff to ask her about the extent of her injuries." "I think he said he would send Dr. Brock." After that Dr. Brock came. He paid her $200.

"Q. Did he say from whom the money came? A. From the company.

"Q. Did he say from what company? A. *I suppose it was the company of the Chesapeake and Ohio railway, the company on whose road I was hurt.*" She says: "The room was dark; it was kept dark."

"Q. Did he give you any paper to sign? A. He did.

"Q. Did you read the paper before you signed it? A. I did not. I couldn't have read it to save my life. I was very ill; I had been awake all night. Mrs. Warder and her daughter and her servant had been taking care of me. I had a fearful headache and could then hardly speak." She says Dr. Brock told her the company had sent her $200 to take care of her until she got up, and if she lost her position the company would see her through (*id.*, p. 12).

As shown by plaintiff, Dr. Brock settled with others. The witness Hunt says:

"He attended to our injuries until we got to Charlottesville, Virginia, and he took the names of the different passengers. After I got to Philadelphia he called to see me, and asked *what I would take to compromise my injuries, and I told him I would charge him nothing except my doctor's bills and loss of time.* He took the money out of his pocket and paid me $140 or $150, and I gave him a receipt for the money" (*id.*, p. 16).

When Dr. Brock called at the house he asked for Mrs. Howard, and was shown up to her room, where he found her in bed. An elderly lady was in the room most of the time.

"It was broad daylight. The room was the ordinary light of a room.

"Q. For what railroad company were you acting? A. The Newport News and Mississippi Valley Company. After some talk Mrs. Howard seemed to think that she was willing to accept $200, which I paid her, and then she signed the paper.

"Q. Did you read the paper to her? A. Yes, sir; I did, and I *stated to her*" (and there is no contradiction of this). "*that in any transaction she had with me she must recollect that I was representing the railroad.*

"Q. Did you tell Mrs. Howard that you were the surgeon of the C. & O. railway? A. No, sir; I do not think that I did. I am pretty sure I did not, *because I was not the surgeon of the C. & O. at that time.*

"Q. Did you discover any inability in Mrs. Howard to settle the case? A. No, sir.

"Q. Did it occur to you that you were dealing with her at a disadvantage? A. No, sir; it never did. If it had I would not have dealt with her.

"Q. Did you ever say to Mrs. Howard that if she lost her place the company would take care of her or see her through, or anything of the kind? A. No, sir; I never did" (*id.*, pp. 50, 51, and 52).

The plaintiff is asked in rebuttal:

"Q. Who brought the doctor up to your room? A. Mrs. Warder brought him up *and she went out of the room.*
"Q. She did not stay at all? A. No, sir."

Mrs. Warder says:

"She showed Dr. Brock up to Mrs. Howard's room, and did not remain in the room, and left no one in it except Mrs. Howard and Dr. Brock; that no one to her knowledge went in while Dr. Brock was there. When Dr. Brock went away witness went to the door with him; did not know who he was, though."

Cross-examined:

"Q. You did not think it improper to stay in the room while he was there, did you? A. *Not at all; I thought it was business and her business, and did not go in. I knew he called on business. When he came out of the room witness went down the steps with him and saw him out of the door, but still did not know who he was.* Witness was in another room, but saw him come out" (*id.*, pp. 84 and 85).

The plaintiff says:

"*I had been signing pay-rolls at the Agricultural Department, and I supposed I was signing a receipt for the money.*"

This is what she did, but not a receipt of money for nothing. She could not have been accustomed to do this at the Agricultural Department. If the plaintiff supposed that the C. & O. Company, or any other company, had made a promise to take care of her in case she lost her place, she has been strangely careless of this cause of action since it accrued. She does not appear to have once recalled it to the company represented by Dr. Brock or to any agent of any company.

Upon such evidence the jury were invited to convict of fraud a gentleman who had no interest to tell anything but the truth, and who could not have been biased by any in-

terest to do otherwise. Had the N. N. & M. V. Company desired to perpetrate a fraud upon this plaintiff they would have selected some other agent. He is not shown to be interested in the outcome of this litigation to the extent of a single share of stock. An intelligent woman was informed a gentleman would come to see her on *business;* practically invites him to call to see her on *business;* suffers every one to leave the room, so that she might be alone with him to transact the *business;* by her agents, and not by her visitor's, darkens the room; and after all these preliminaries (over which she had control and her visitor none) says she signed a paper without knowing what was in it. She not only suffered her friend to go out of the room, so as to be left friendless, but her friend evidently deemed it a natural thing to do, though she knew the visit was one of *business.* The record shows that it was in Mrs. Howard's power to call any one, or all, of three persons to her assistance—Mrs. Warder, Mrs. Warder's daughter, and Mrs. Warder's servant—and she chose to dispense with the services of all of them, and it did not occur to one of them that the presence of any one was needed. Dr. Brock has so little connection with the C. & O. Company at this time that he does not even know who is president of it; has no connection with it save as a physician. On this testimony he is to be convicted, not only of a fraud upon a helpless woman, but upon the company which employed him. When the company gave him a printed paper which plainly said one thing, he is alleged, without imaginable motive therefor, to have said another thing. The subject of negotiation, the receipt which was given for the money, was equally open to the inspection of both parties.

Dr. Brock went with no knowledge that the plaintiff could not or would not read the paper he carried with him for her to read and to execute. This paper is the best possible evidence of the representation he was expected to make. If the plaintiff, who at the time was perfectly able

to write, happened to be unable to read, she was at least able to apprise herself of the contents of the paper by the aid of others, shown by her testimony to be able and zealous to serve her. For him to have handed her a paper to sign, in the confidence that a party who was able to write would not be able to read, would have been remarkable. The arrangement for his reception was not his artifice. She, by her own account, environed herself with darkness. It was her preparation. He accepted a situation which others had prepared and as the plaintiff chose that it should be. Can the victim of fraud prearrange all the instrumentalities essential to success and then complain of what could only occur by reason of such prearrangement?

In *Keyser vs. Hitz* it is said in respect to the effect of the signature of the defendant to dividend checks:

"*If she endorsed them or either of them she is estopped to say that she did not know their contents*" (133 U. S., 149).

"The law does not afford redress to one who suffers by not using the ordinary means of information, whether his neglect be attributable to indifference or credulity" (*Andrus vs. St. Louis, &c., Co.*, 130 U. S., 647).

"If, having eyes, he will not see matters directly before them, where no concealment is made or attempted, he will not be entitled to favorable consideration, when he complains that he has suffered from his own voluntary blindness, and been misled by overconfidence in the statements of another" (*Slaughter's Adm'r vs. Gerson*, 13 Wall., 383).

"*It would lead to startling results if a person who executes, without coercion or undue persuasion, a solemn release under seal, can subsequently impeach it on the ground of his own carelessness, though at the very time of its execution he might, had he seen fit, have advised himself fully, as to the nature and legal effect of the act he was doing. * * * He cannot invoke his own heedlessness to impeach his solemn release and then call that heedlessness some one else's fraud. * * * Such evidence as that which the plaintiff has adduced cannot be treated as sufficient to strike down as fraudulent a written instrument under seal*" (*Spotey vs. B. & O. R. R.*, 75 Md., 171).

"If this were permitted contracts would not be worth the

paper on which they are written. But such is not the law. A contractor must stand by the words of his contract; and if he will not read what he signs, he alone is responsible for his omission" (*Upton vs. Tribilcock*, 91 U. S., 50).

"The obligation of an instrument which one signs without reading is not avoided by mere ignorance of its contents" (*Bacon vs. Proctor*, 33 N. Y. S., 995).

This court has approved the language in *Ludington vs. Renick*, 7 W. Va., 273:

"A party seeking the rescission of a contract, on the ground of misrepresentations, must establish the same by clear and irrefragable evidence" (*Farnsworth vs. Duffner*, 142 U. S., 48).

A mere preponderance of evidence which at the same time is vague or ambiguous is not sufficient to warrant the annulment of a contract on the ground of alleged fraudulent representations. The proof must be clear and satisfactory (*Lalone vs. U. S.*, 164 U. S., 255).

"Fraud is not so lightly imputed. * * * It devolves upon him who alleges fraud to show the same by satisfactory proof" (*Jones vs. Simpson*, 116 U. S., 615).

"It does not require a great deal of ingenuity to throw suspicion upon any transaction. Circumstances which should avail for the proof of fraud are such only as are inconsistent with a contrary view of the transaction, and lead irresistibly to that conclusion" (Grier, J., in *Turner vs. Hunt*, 3 Wall., Jr., 111).

"He does not pretend that he told W. that he could not read and asked to have it read or explained. * * * As he wrote his name W. had a right to presume that he could read and had read it. * * * As is said by Chief Justice Gibson in Greenfield's Estate, 2 Harris, 496: 'If a party who can read will not read a deed put before him for execution, *or if being unable to read* will not demand to have it read or explained to him, he is guilty of supine negligence, which, I take it, is not the subject of protection, either in equity or at law.' * * * It has been more than once held that it is error to submit a question of fraud to the jury upon slight parol evidence to overturn a written in-

strument. *The evidence of fraud must be clear, precise, and indubitable; otherwise it should be withdrawn from the jury. Since parties are allowed to testify in their own behalf it has become still more necessary that this important rule should be strictly adhered to and enforced.*"

Sharswood, J., in *Penn. R. R. Co. vs. Shay*, 82 Pa. St., 203; S. P., *Lynn vs. B. & O. R. R. Co.*, 60 Md., 413.

Tried by this rule, what proof in this case justified the submission of the issue of fraud, even had fraud been one of the issues? Suppose Dr. Brock to have said (what he denies), "The company will see you through if you lose your place;" suppose him to be an agent authorized to bind the company by such a contract (and he certainly was not); suppose a right of action upon this promise to have accrued to the plaintiff, it is one she has never asserted, and one which in this action (migratory as it seems to be) she could not assert. It is not pretended he told her that any such promise was in the paper she signed. Manifestly such a contract of assistance could not be supposed in a paper which she assumed was only the acknowledgment of a gift. Again, suppose he did say to her that this $200 was given to her to tide her through or for loss of time, he at the time believing her injuries to be slight, what fraud would there be? "I told him," said Mr. Hurst, "that I would charge for nothing except my doctor's bills and loss of time" (Rec., p. 76). This is not the language of fraud nor the language of donation. The trial court said: If he stated to her "that it was a receipt for $200.00," and if she "signed the release under the belief that it was a receipt only, and did not know that it was a release until some time afterwards," then the same is "void as a release" (Rec., p. 89). Suppose he did say, in handing her the paper, "Here is the receipt for the $200.00." Must these perfectly true words be construed to be a deception, intended by the speaker, and necessarily beguiling the plaintiff into a belief that it was not also a re-

lease, which she can set up in avoidance of the instrument nearly twelve years after the execution thereof and eight years after the plea thereof?

XIX.

A party is not permitted to set up that an instrument was procured by fraud and at the same time retain the benefits received under it, nor is unreasonable delay permissible after the alleged discovery of the fraud.

"Where a party desires to rescind upon the ground of mistake or fraud, he must, upon the discovery of the facts, at once announce his purpose and adhere to it." Otherwise, "he will be held to have waived the objection, and will be conclusively bound by the contract, as if the mistake or fraud had not occurred. *He is not permitted to play fast and loose. Delay and vacillation are fatal to the right which had before existed*" (*Grymes vs. Sanders*, 93 U. S., 62).

"It has also been insisted that this instrument was procured by fraud from C through the contrivance of J; but the evidence relied on is very general and unsatisfactory, and besides it is too late. * * * And what is more remarkable on this point, he (C) is the chief witness to make out the alleged fraud" (*Day vs. Union, &c., Co.*, 20 How., 218).

"There is another insurmountable obstacle in the complainant's way upon this feature of the case, and that is, although she desires to set aside the contract of release, she still retains the consideration, and has never offered to return it. * * * This is not only a rule of common honesty and fairness, but has been recognized by the courts from time immemorial, * * * and these offers should come promptly, not reluctantly or tardily. To withhold a restitution is to exhibit a want of confidence in the integrity and justness of his case, who seeks to set it aside on the ground

of fraud" (*Barker vs. Northern Pac. R'y Co.*, 65 F., 461–'2 S. P., *Clarke vs. Dickson*, 96 E. C. L., 148; *Brown vs. Ins. Co.*, 117 Mass., 479; *Potter vs. Ins. Co.*, 63 Me., 440; *Norwich, &c., Co. vs. Girton*, 124 Ind., 217.)

"A release by plaintiff of a claim for damages for an injury received through defendant's negligence, *though obtained by fraud*, is valid until disaffirmed by tendering back the money paid" (*Kreutzen vs. 42d, &c., R. Co.*, 13 N. Y. S., 588; S. P., *Cobb vs. Hatfield*, 46 N. Y., 533; *Shiffer vs. Deetes*, 83 *id.*, 300; *Gould vs. Bank*, 86 *id.*, 75).

"*The money was paid expressly as a compromise and not because it was conceded to be due*" (*McMichael vs. Kiliner*, 76 *id.*, 46).

Where the claim was that the release was signed by a party who was intoxicated the court said:

"Having received the money, if he desired to repudiate the adjustment when he became sober, it was incumbent upon him to promptly inform appellee of this fact, and to tender back the money received" (*Stewart vs. H. & T. C. R. R.*, 62 Tex., 249).

"Such a settlement ought not to be overthrown, even if the court should now be of opinion that the party complaining of it surrendered rights that the law, if appealed to, would have sustained" (*Hennessey vs. Bacon*, 137 U. S., 85).

The only "offer of compromise" ever made to Mrs. Howard was the one made through Dr. Brock and accepted by her. Her counsel refers to it as "compromise" and "settlement" (*id.*, p. 48); and, evidently under the impression that it would not bind a married woman, sought to use it as a recognition of liability. Since May 28, 1890, there has been the allegation of record *that the writing executed by Mrs. Howard was a release of any claim she had, and never has there been any allegation that the same was procured by any kind of fraud, and never until both sides had closed their evidence at the last trial, in May, 1898, was there any offer to return* the money; and then the offer was not to return it to the N. N. & M. V. Company from whom it had been received, but to the

attorney of the C. & O. Railway Company, by whom or by whose client it had not been paid.

XX.

Where fraud is not charged in the pleadings, it cannot be considered at the trial.

Not only was the question of fraud submitted to the jury without legal proof, but it was so submitted in the absence of any accusation, allegation, or issue under which it could be submitted at all. The jury was only sworn to try the issues joined between plaintiffs and defendant, and had not been sworn to try that which was not one of those issues.

"Whether the fraud be alleged in the declaration, complaint, or bill, or set up by way of defense in the plea, answer, or *replication*, it is essential that the facts and circumstances which constitute it should be set out clearly, concisely, and with sufficient particularity to apprise the opposite party of what he is called upon to answer" (9 Encycl. of Pleading and Practice, p. 687).

S. P., *Hamilton vs. Ross*, 23 Neb., 630.

"There is nothing in the pleadings anywhere which would serve as a basis for that line of inquiry. No fraud is alleged. Such allegation was necessary to admit proof of the fact" (*id.*, p. 634).

"*Were there even proof of fraud, it ought not to affect him here, for he had a right to know it is alleged, and thus have an opportunity to put it in issue before evidence of it can be received*" (*Johnson's Appeal*, 9 Pa. St., 425).

"Relief will not be afforded, even on the ground of fraud, unless it be made a distinct allegation in the bill, so that it may be put in issue by the pleadings" (Nelson, J., in *Patton vs. Taylor*, 7 How., 159; S. P., *Very vs. Levy*, 13 *id.*, 345–361).

"Can the defendants avail themselves of fraud, even if it be proven by the evidence when it is not charged in the answer and *not put at issue in the pleadings?*" (*Timms vs. Shan-*

non, 19 Md., 296). "In this case there is no allegation of any fraud, accident, or mistake in the execution of the bonds or mortgage, and in the absence of such allegation the same general rule prevails in equity as at law" (*id.*, 312, 313; *Grove vs. Rentch*, 26 *id.*, 367; S. P., *Wesley vs. Thomas*, 6 H. & J., 24).

"*Evidence as to alleged false representations which are not averred in the pleadings should be excluded*" (*McCracken vs. Robison*, 57 F., 375).

The defendant, if legally summoned, had not been summoned to meet this issue, and by no subsequent pleading had been advised to defend against it.

The Court of Appeals says that the objection that the trial court submitted the case to the jury on an issue not made by the pleadings cannot be "raised for the first time on appeal" (Rec., p. 120). It is respectfully submitted that this is an objection raised by the pleadings themselves, from the time they are complete until the end of the trial. The trial court is bound to submit the issues which are raised by the pleadings, and no other issues, and bound to know them for this purpose. As soon as the court used the language, which did submit to the jury an issue not raised by the pleadings, exception was at once taken thereto. The reason of the rule adverted to is that the objection might be obviated at the trial.

"The reason of the rule does not apply here as the objection could not have been obviated on the trial, the declaration wanting the necessary averments under which to admit the requisite proof" (*Curtiss vs. Mars*, 29 Ill., 512).

Besides objection was made and exception taken at the trial, that the submission of this and the other issues to the jury was unwarranted by the pleadings and evidence in the cause (Rec., p. 86).

To the charge of the court submitting the issue in the absence of any pleading to justify it the defendant promptly objected and excepted (Rec., pp. 88 and 89).

It is held in *Lyons vs. Allen*, 11 App. D. C., pp. 551, 552, the plaintiff "must disaffirm and rescind the release *in toto* if the facts justify him in so doing, and return or offer to return what he has received under it before bringing his action." In the case at bar it was necessary to do this, at least before filing replication, and necessary to file a replication alleging the fraud. From May, 1890, to May, 1898, no offer to return was ever made to any one; no such offer to return ever has been made to the party from whom the money was received, and no allegation of fraud ever has been made in any pleading.

XXI.

Twenty-fifth and Twenty-sixth Assignments of Error.

An amendment which changes an action ex contractu into an action ex delicto creates a new cause of action, to which the bar of limitations will apply.

In their original declaration filed November 12, 1887, the plaintiffs waived the tort and sued in *assumpsit*. After having waived the tort and sued in contract on May 13, 1890, over the defendant's objection, they were permitted to waive the contract and sue in tort. To this the statutory bar was pleaded by the defendant and issue joined thereon. After this issue had been pending for two years leave was granted to the plaintiffs to strike out their replication and demur to plea, which was done and the demurrer sustained. Two motions to set aside the order sustaining this demurrer were overruled (Rec., pp. 7, 8, 9). The defendant at the trial renewed the objection of the statutory bar (*id.*, p. 86). The Court of Appeals ruled in 11 D. C.:

"Whether the cause of action remains the same should be the test, and the mere change from the form of action in *assumpsit* to one in tort would be immaterial."

It is respectfully submitted that after such revolution in form the cause of action does not remain the same. For this reason it is the rule of the common law that a count in contract cannot be joined with one in tort. Hence an attempt to change the nature of the action from one of tort to one in contract or *vice versa* is properly not an amendment, but a substitution of a cause of action different in nature and substance from that originally stated (1 Encyc. of Pl. and Pr., p. 567).

A new cause of action, which was barred at the time of the amendment, but which was not barred when the action was brought, will not defeat the operation of the statute as to such new matter (Wood on Limitations, p. 623).

" Nor is the difference merely formal or technical between actions founded in tort and in contract " (*Garland vs. Davis*, 4 How., 144).

The original declaration sets out that the defendant, in consideration of the usual and customary fare, "*agreed and contracted* with the said Laura P. Howard to safely carry and transport her over their said line of railway," and then sets out the breach of this contract. This is an action upon contract, and to this the defendant put in the plea of *non-assumpsit*. The charge in the amended declaration is that the plaintiff purchased a ticket entitling her to a passage upon the said railway from, &c., "and the defendant *thereby became bound* to safely carry and transport the said Laura P. Howard," &c., and further states, " The defendant did not carry and transport the said Laura P. Howard, *as it was bound to do* "—an action in tort founded on the common-law liability of the common carrier, to which the plea of not guilty was properly filed, and upon which issue was made up and the trial had. The difference in the declarations may be seen by a comparison of the forms in 2d Chitty's Pleadings, pp. 117–271.

"An injured passenger may sue either in *assumpsit* upon the contract, or *in case* upon the breach of the duty raised by the law" (Patterson on Accident Law, p. 390).

But having originally waived the tort and declared in assumpsit, the plaintiffs cannot redeclare in tort more than three years after the cause of action is alleged to have accrued, and more especially when in this jurisdiction the statutory bar to an action *ex delicto* is one year (Abert's Compiled Statutes, D. C., p. 360). It is further to be observed that by their original allegation that the defendant "*agreed and contracted* with the said Laura P. Howard," &c., the plaintiffs affirm, that the female plaintiff had the capacity to contract anywhere with anybody and base their cause of action thereon. Hence if, as has since been argued in connection with the acquittance, the female plaintiff, by reason of coverture, was unable to contract, no cause of action was stated in the original declaration, and there was nothing to amend by.

Suit was against the company as common carrier for negligence; amendment was trover and trespass *vi et armis*. Held that although both were *ex delicto*, yet they were different causes of action, and that the statute would apply (*Palmer & Co. vs. Express Co.*, 52 Ga., 240; see also *Weeks vs. So. Pac. R. R. Co.*, 61 Cal., 149).

The statute will operate against an amended declaration, which for the first time sets up a sufficient cause of action or sets up a new cause of action (*Johnson vs. D. C.*, 1 Mackey, 427; *Union Pacific Company vs. Wyler*, 158 U. S., 285).

The question of what constitutes a departure in an amended pleading is to be determined by the rules of the common law (*id.*, p. 290).

"An action of assumpsit was changed by amendment into an action of debt; the conclusion was that the amendment was a new cause of action (2 Sneed, 492). * * * It is argued by counsel for plaintiff in error that all the facts

required by the Alabama statute to be pleaded were already pleaded in the declaration, and that simply to mention the statute in the amendment and recite the same facts therein would not be a new cause of action. * * * As the first petition proceeded under the general law of master and servant, and the second petition asserted a right to recover in derogation of that law, in consequence of the Kansas statute, it was a departure from law to law. * * * The plaintiff may introduce a new cause of action by amendment; but such amendment cannot have relation to the commencement of the suit, so as to avoid the bar of the statute of limitations" (*id.*, pp. 292, 293, 295, 297).

From all that precedes, it is shown, that the motion for a peremptory instruction in favor of defendant at the close of the plaintiffs' case should have been granted, and *a fortiori* the same motion at the close of the whole case.

[The subjoined references to litigation, in which the N. N. & M. V. Co. was a party in the United States circuit court and in this court, were noted by counsel after the foregoing had been printed:

N. N. & M. V. Co. vs. Howe, 52 F., 362; October 4, 1892; statement by Taft, circuit judge:

"The defendant below was a corporation of the State of Connecticut, operating a railroad in Kentucky. * * * Howe was a brakeman *on a freight train running east from Lexington at night*" (*id.*, p. 363).

Rhea vs. N. N. & M. V. Co., 50 *id.*, p. 16 (on a bill filed April 9, 1890):

"The defendant is a Connecticut corporation, engaged in operating a line of railway from the city of Louisville, Ky., to the city of Memphis, Tenn. * * * *The original railroad to whose rights and franchises the defendant has succeeded*," &c. (Jackson, circuit judge, *id.*, p. 17).

Jones vs. N. N. & M. V. Co., 65 F., 736:

"The plaintiff filed two petitions 'in the Caldwell circuit court of Kentucky against the N. N. & M. V. Company, a

corporation organized under the laws of Connecticut and a citizen of that State, engaged in operating under a lease the railroad of the C. & O. S. W. Company.' That said C. & O. S. W. R. R. Co. leased said railroad from Louisville to Paducah, &c., to the defendant, which took possession under said lease, and for several years last past has operated and controlled said road under said lease, and assumed the duties and contracts of said lessor company," &c. (*id.*, pp. 737–'8; *N. N. & M. V. Co. vs.* U. S., 61 *id.*, p. 488; *Fidelity, &c., Co. vs. N. N. & M. V. Co.*, 70 *id.*, p. 403; *N. N. & M. V. Co. vs. Hendricks*, 154 U. S., 527; *N. N. & M. V. Co. vs. Pace*, 158 U. S., 36).]

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For Plaintiff in Error.

No. 247.
Brief of Perry & Smith for D. C.

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JAMES H. MCKENNEY,
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Filed April 3, 1900.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 247.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

WILLIAM HOWARD AND LAURA P. HOWARD, HIS WIFE.

BRIEF OF DEFENDANTS IN ERROR.

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LAW REPORTER PRINT.

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BRIEF OF DEFENDANTS IN ERROR.

STATEMENT OF CASE.

(*a.*) *Pleadings.*

On November 12, 1887, the defendants in error, William Howard and Laura P. Howard, his wife, filed in the Supreme Court of the District of Columbia their declaration in *assumpsit* against the plaintiff in error, The Chesapeake and Ohio Railway Company.

The ground of action set forth in the declaration was the failure of the defendant company to carry safely the said Laura P. Howard, who, while a passenger in its cars, was, on November 12, 1886, injured for life by its negligence (Rec., pp. 1, 2).

On December 6, 1887, the defendant company appeared by *attorney* and filed two pleas to the jurisdiction of the court. These pleas were not verified (Rec., pp. 3, 4).

On January 27, 1890, these pleas were, upon motion of counsel for the plaintiffs, stricken out, judgment by default entered for the plaintiffs, and an inquisition of damages awarded (Rec., p. 4).

On February 4, 1890, the defendant *tendered for filing* two pleas (Rec., pp. 4, 5).

Apparently at or near the same date the defendant moved to set aside the judgment by default. Such motion, however, does not appear of record.

On February 15, 1890, Montgomery, J., set aside this judgment by default, "*for the purpose of permitting the defendant to plead the general issue, and for no other purpose*" (Rec., pp. 99, 100).

On February 17, 1890, the defendant accordingly pleaded the general issue (Rec., p. 5).

On March 8, 1890, the plaintiffs withdrew their motion to strike from the files the pleas tendered on February 4, 1890 (Rec., p. 6). As these pleas were never filed, a motion to strike them from the files was useless. It clearly appears from the opinion of Montgomery, J. (Rec., p. 99), that they were not treated by him as filed.

The pleadings thus far were thus reduced to the declaration and the general issue.

On May 13, 1890, the plaintiffs filed an amended declaration in the case (Rec., pp. 6, 7).

On May 28, 1890, the defendant—

> "not waiving its rights under former pleas, but insisting thereon, and excepting to the ruling of the court allowing the filing of the amended declaration"—

pleaded to that declaration as follows:

1. Not guilty.
2. The Statute of Limitations.
3. A release from the said Laura P. Howard (Rec., pp. 7, 8).

On June 14, 1890, the plaintiffs joined issue upon those pleas (Rec., p. 8).

On July 5, 1892, leave was given the plaintiffs to withdraw replication to second plea to amended declaration and to demur thereto (Rec., p. 8).

On February 4, 1893, a demurrer to this second plea was sustained (Rec., p. 9).

On May 18, 1894, defendant's motion to set aside the order sustaining this demurrer was overruled (Rec., p. 9).

On November 30, 1896, a second motion of the defendant to the same effect as that last stated was overruled (Rec., p. 9).

The cause thus stood for trial upon the amended declaration and the two pleas of the general issue and of a release.

The first trial occurred in December, 1894, when the plaintiffs withdrew a juror (Rec., p. 101).

The second trial occurred in ~~May, 1898~~ Dec 1896 (Rec., p. ~~102~~), and resulted in a verdict for the defendant under the instructions of the court (~~Rec., p. 105~~).

The judgment upon this verdict was reversed by the Court of Appeals of the District of Columbia upon the plaintiff's appeal (Rec., p. 105). 11 App. D. C. 300.

The third trial resulted in a verdict for the plaintiffs for $30,000 damages, upon which judgment was entered on June 25, 1898 (Rec., p. 9).

The Court of Appeals affirmed this judgment upon appeal (Rec., pp. 105–123).

To reverse this judgment of the Court of Appeals this writ of error has been sued out.

(*b.*) *Evidence.*

The plaintiff Laura P. Howard, who is the wife of the plaintiff, William Howard, was, in the year 1886, employed by the United States Government in the Department of Agriculture, in the District of Columbia (Rec., p. 11). In September, 1886, she visited her home in Jeffersonville, Indiana, on her annual leave. On the 16th day of November, in that year, she went from Jeffersonville across

the Ohio River, to the city of Louisville, Kentucky, where she purchased at a "scalper's" ticket office a return coupon ticket of the Chesapeake and Ohio Railroad Company from the said city of Louisville to the city of Washington, in the District of Columbia (Rec., p. 11).

A few days prior to the purchase of this ticket she had read (Rec., p. 13) in the Louisville Courier-Journal the advertisement of the Chesapeake and Ohio Railroad Company (Rec., pp. 20, 21) with respect to its service between the cities of Louisville and Washington. About 7 o'clock in the evening of the said 16th day of November, she went, in accordance with the said advertisement, to the station of the said railroad, and there had her baggage checked from Louisville to Washington, and got on board a train of cars which was marked "Chesapeake and Ohio Train," and the train started shortly afterwards. This train was scheduled to leave Louisville at 7.30 P. M. A short time after the train started, its conductor took up her railway ticket and kept it. She retired to her sleeping berth (Rec., p. 11).

She was awakened by a violent jerking of the car, and almost immediately the car was tumbling over an embankment. She was thrown out of her berth with great violence, falling on her back. The partitions were reduced to splinters, and the car was completely wrecked. She was extricated from the car by five men, who lifted her through the window. She was afterwards taken on the car of the superintendent of the railway, and she was there examined by Dr. C. W. P. Brock, who told her that he was the chief surgeon of the defendant, and that he was on his annual tour of the railway at that time. She was transferred afterwards from that car to another sleeping car and came on to Washington. She was taken to a house on Eleventh street, in the said city, where she remained confined to her bed. She was there visited a day or two after her arrival by Mr. Frank Trigg, who was the local agent of the defendant,

and who consulted with her as to her injuries (Rec., p. 11.)

The next day Dr. Brock called to see her, and offered her two hundred dollars, stating that it was for the purpose of "tiding her over the time she was kept from her employment." He presented a paper already prepared for her to sign, and she signed it, supposing it to be a receipt for the two hundred dollars which Dr. Brock then paid her (Rec., p. 12). She remained confined to her bed, suffering great pain. Her condition, instead of improving, grew worse, and she was finally advised by her local physician to go to New York City and consult a specialist. She accordingly went there and placed herself under the treatment of Dr. Christie, an eminent specialist on spinal diseases, and she has been under his treatment ever since. She has never been able to resume her employment, and has, from the time of her accident to the time of the present trial, continued to suffer constantly increasing disability (Rec., p. 12).

Character and Extent of Mrs. Howard's Injuries.

Her injuries are thus described by her physicians:

Doctor Samuel W. Bogan, who testified that he is a practising physician in Washington, first saw Mrs. Howard professionally in May, 1894; found her in bed suffering from intense neuralgia of the stomach, head, sides, and back. She suffered a great deal from congestion—that is, from increased flow of blood to the brain—the effects being blindness, giddiness, and intense pain over the eyebrows. That attack lasted two weeks, and he saw her every day; has attended her constantly since then, principally for the results of the injury she received. The disease she suffered from is known as Potts' disease of the spine, which consists in a rotting really of the bones of the spine. The decayed bones work out of the system by means of abcesses, which have to be cut open. She suffers from dyspepsia almost constantly, and has to be dieted very strictly. She is at

this time losing the power of the left limb. Since he became acquainted with her case Mrs. Howard has slowly gotten worse. The disease is incurable. She suffers as if she had a constant toothache (Rec., p. 17).

The court and jury retired to the judge's room, where Mrs. Howard was exhibited before the jury wearing the apparatus referred to, and Doctor Bogan explained to the jury the different parts of this apparatus and the functions that they serve (Rec., p. 17).

Doctor Thomas M. Ludlow Chrystie, who testified that he is a physician residing in New York City and a specialist in spinal diseases. Mrs. Howard placed herself under his treatment early in 1887, and has been under his treatment ever since. She is suffering from an incurable spinal affection which is progressive, occasioning great suffering and almost total disability. During the first part of this treatment she was in New York under his care for the greater part of the time. During the subsequent years she came there about once or twice a year. Witness had contrived and made for her an apparatus grasping the hip and extending up to the shoulders and giving support in front, which steadies the back as a broken bone would be steadied, and gives her partial relief, but the disease is located so low down, so much superincumbence of weight from above, that it does not give her complete relief. It is made of steel and should be worn constantly. She should sleep in it. It is necessary for her to wear it for her comfort as well as for the protection of her backbone. The disease has progressed slowly. If it had not been for this spinal assistant I think she would have had complete paralysis (Rec., p. 18).

Negotiations of Plaintiff in Error with Mrs. Howard.

On the 7th of March, 1887, Charles H. Tweed, counsel for the Chesapeake and Ohio Railway Company, wrote to the plaintiff's agent a letter (Rec., p. 47), in which he asked

to have the plaintiff examined by Dr. Meredith Clymer, and the plaintiff testified that she was so examined by Dr. Clymer, who, as she insisted, came at the instance of the defendant (Rec., p. 13). Failing to secure any satisfactory settlement with the defendant, the plaintiffs, on the 12th of November, 1887, filed their original declaration in this cause (Rec., p. 1).

Facts Set Forth in Bill of Exceptions.

In order that the court may understand the points involved in the bill of exceptions, it is necessary to briefly call attention to the facts, set forth in the bill of exceptions, in connection with the operation of certain railways between the city of Washington, in the District of Columbia, and the city of Louisville, in the State of Kentucky.

The line of the Chesapeake and Ohio Railway Company runs from Fortress Monroe, in the State of Virginia, to the west bank of the Big Sandy River, which river separates the State of West Virginia from the State of Kentucky. From the west bank of the Big Sandy River to the town of Lexington, in the State of Kentucky, there extends the Elizabethtown, Lexington and Big Sandy Railroad Company, a corporation chartered under the laws of the State of Kentucky. From the town of Lexington to the city of Louisville there extends the Louisville and Nashville Railroad Company. From the city of Washington, in the District of Columbia, to the city of Charlottesville, in the State of Virginia, on the line of the Chesapeake and Ohio Railway Company, there extended (at the time in question) the Virginia Midland Railway Company. In November, 1879, the Chesapeake and Ohio Railway Company and the Elizabethtown, Lexington and Big Sandy Railroad Company made an agreement in consequence of which through trains were run upon what was called the C. & O. route (Rec., p. 45).

Mr. Wickham, the general solicitor for years of the de-

fendant under all its different metamorphoses, testified (Rec., p. 45) that this C. & O. route—

> *"was a well-known line, and was being pushed and advertised for all it was worth. Through trains were run upon this route . . . under an arrangement by which it was practically a continuous system."*

From 1882 these two railroads were operated together by one general manager, Mr. C. W. Smith, under the verbal directions of Mr. C. P. Huntington, who was president of the C. & O., and controlled a majority of the stock of the Elizabethtown, Lexington and Big Sandy Railroad Company. Under this arrangement the officers of the C. & O. Company operated and maintained a line of railroad for, and on account of, the Elizabethtown, Lexington and Big Sandy Railroad Company from the west bank of the Big Sandy River to Lexington. This arrangement continued in effect until the organization of the Newport News and Mississippi Valley Company, when its operating officers, who were General Wickham and Mr. H. W. Fuller, operated the properties under the leases. Mr. Huntington undoubtedly controlled the whole enterprise, in that he held a controlling interest in each company. He was president of the C. & O. RR. Company and also of the Newport News and Mississippi Valley Company, and Mr. Reed, who was president of the Elizabethtown, Lexington and Big Sandy Railroad Company, acted always in Mr. Huntington's interest (Rec., pp. 45, 46).

It now becomes necessary to consider how the Newport News and Mississippi Valley Company came into existence, and the extent to which it was a veritable company. We learn from the testimony of Henry T. Wickham (Rec., p. 41) as follows:

> Collis P. Huntington, a native of the State of Connecticut, was largely interested and the controlling spirit in a number of railroads both west and east of the Mississippi. He had a plan for bringing

practically into one management a line of road extending from the Atlantic to the Pacific. He consolidated his lines west of the Mississippi under the name of the Southern Pacific Company. In the progress of this plan he got a charter from the State of Connecticut under the name of the Southern Pacific Company, which name, as regards the lines east of the Mississippi river, was subsequently changed by the Connecticut legislature to the Newport News and Mississippi Valley Company. He organized his lines east of the Mississippi river, consisting of the Chesapeake and Ohio Railway Company, the Elizabethtown, Lexington and Big Sandy Railroad Company, and the Chesapeake and Ohio Southwestern Railroad Company. The dates of the various acts constituting the charter of the Newport News and Mississippi Valley Company are March 27, 1884, incorporating the Southern Pacific Company; March 10, 1885, changing the name to the Newport News and Mississippi Valley Company, and an amendatory act approved April 27, 1887. The Newport News and Mississippi Valley Company had organized and taken a number of leases from the foregoing companies when a question arose as to the provisions of the original act, approved March 27, 1884, which provided that the Newport News and Mississippi Valley Company should not have the power to make joint stock with, own, hold, or operate any railroad in the State of Connecticut. The amendment of April 27, 1887, had these words: 'Unless such railroad shall be held, owned, or operated within said State in conformity with the provisions of the general law of the States.' The lease from the Chesapeake and Ohio Company to the Newport News and Mississippi Valley Company transfers from the former to the latter for a period of 250 years from July 1, 1896, the former company's railroad from Phœbus, Virginia, to Huntington, West Virginia, together with its rights and privileges arising out of its agreement with the Elizabethtown, Lexington and Big Sandy Railroad Company in respect of the railroad between Huntington and the west side of the Big Sandy river. The lease is signed by the said

C. P. Huntington, as president of each company. The lease from the Elizabethtown, Lexington and Big Sandy Railroad Company to the Newport News and Mississippi Valley Company is dated January 29, 1886, and transfers from the former to the latter company for a period of 250 years from the 1st of February, 1886, the railroad extending from Lexington, Kentucky, to the west side of the Big Sandy river, together with its rights to the railroad from the west bank of the Big Sandy river to Huntington. At the date of these leases the said Mr. Huntington was the president of the Chesapeake and Ohio Railway Company and the president of the Newport News and Mississippi Valley Company. Mr. Reed was president of the Elizabethtown, Lexington and Big Sandy Company, but Mr. Huntington controlled both these roads in that he owned a very large portion of the stock, and controlled most of that which he did not own. In one sense it was all under his control, but not in the sense of their being the same legal entities (Rec., pp. 41, 42, 43, 44).

To resume briefly what has been said, we have, down to this point, the following situation: The defendant was not, at either end of the route, an initial carrier between the cities of Washington and Louisville. It originally operated and controlled a line of railroad extending from Fortress Monroe, in the State of Virginia, to the west bank of the Ohio River. It was a connecting and a subordinate link in any system between the two cities. A person going from Washington to Louisville would go from Washington to Charlottesville by the line of the Virginia Midland; from Charlottesville to the west bank of the Ohio River, he would go over the line of the defendant. From the west bank of the Ohio River to the town of Lexington, in the State of Kentucky, he would go over the line of the Elizabethtown, Lexington and Big Sandy Railroad Company. From Lexington to Louisville he would go over the line of the Louisville and Nashville Company. Coming from Louisville to

Washington, he would reverse this order (Rec., pp. 55–60).

As has been seen from the testimony of Mr. Fuller, the defendant, as early as 1879, so far as appears from this record, abandoned its position as an intermediate carrier. In 1885 it established offices in the cities of Washington and Louisville, and advertised itself as a through carrier. It not only made an arrangement with the Elizabethtown, Lexington and Big Sandy Railway Company, in pursuance of which a bridge was built across the Big Sandy River, but in 1882 it assumed the management and operation of the latter railroad under an agreement had early in 1882, running for five years, and continued the entire operation and management of that road under that agreement until the lease to the Newport News and Mississippi Valley Company. So that, prior to the said lease, the defendant company had entire management and control of the railroad from Charlottesville, in Virginia, to Lexington, Kentucky.

This statement will be enforced by reference to the lithographic exhibit (Rec., pp. 44, 45), from which it will appear that, under date of November 21, 1886, the defendant company advertised its railroad as extending from Lexington, in Kentucky, to Fortress Monroe. The character of its advertisements in November, 1886, is disclosed at pages 20, 21, 22, 23 of the Record, as also by the advertisement contained on the back of the lithographic exhibit above referred to.

It may be well to note just here, in connection with the many changes of name of these companies, that it appears in evidence (Rec. p. 19) that the names of these roads were changed so often that a person whose business it was to sell tickets testified that he "didn't keep track of them."

It appears from the testimony of Mr. Henry W. Fuller (Rec., pp. 24, 55–60) that the defendant company located its office in the city of Washington, at 513 Pennsylvania avenue, at the corner of Sixth street, and that it never moved from there.

They put the name Chesapeake and Ohio Railway Ticket Office on the windows and over the doors. No changes have been made in the signs except coloring and style; we try to improve them occasionally. As to the other advertisements (the newspapers), at the time we were operated by the Newport News and Mississippi Valley Company, for reasons I explained, purely advertising reasons, we always continued to use Chesapeake and Ohio Railway, Chesapeake and Ohio Route. Could not say that from the time I commenced, in 1882, I ever advertised that I was a general passenger agent of the Newport News and Mississippi Valley Company; don't think the sign was ever changed.

Such was the situation at the time of the making of the alleged lease by the defendant road and by the E. L. & B. S. Road to the Newport News and Mississippi Valley Company. It has been seen (Rec., p. 36) that the date of the lease from the defendant company was June 15, 1886, and of the lease from the E. L. & B. S. Company was January 29, 1886 (Rec., p. 32); and that each was for a term of 250 years. It must be recollected that the E. L. & B. S. Company was, in the year 1886, operated by the defendant company under a contract made in the early part of 1882 for 5 years, and which consequently would not terminate until 1887 (Rec., p. 45). The exact time when the Newport News and Mississippi Valley Company professed to begin to operate the defendant road, and the E. L. & B. S. road, does not clearly appear from the Record. The Newport News and Mississippi Valley Company does not appear from the Record to have had any other property than its Connecticut franchise. It owned no road-bed anywhere.

It acquired its equipment by purchase from the various companies composing it, which were the defendant company, the E. L. & B. S. Company, and the Chesapeake and Ohio Southwestern Company. Upon its dissolution the rolling stock was turned back to the original companies that contributed it (Rec., p. 26).

The company itself (the Newport News and Miss. Valley Co.) disappeared so completely that its former officer can not tell what has become of it (Rec., p. 60). The defendant company got into financial difficulties, and was put into the hands of a receiver by the decrees of the Circuit Court of the County of Henrico, in the State of Virginia, on the 27th day of October, 1887, and of the Circuit Court of Kanawha County, in the State of West Virginia, on the 28th day of October, 1887. The substance of the bills in equity upon which these appointments were made will be found in the Record at pages 77–81, and it will be observed that in each case this same C. P. Huntington was plaintiff. It will be further observed by a reference to the Record, *passim*, that the other officers of these companies in their various transformations remained substantially the same. The receiver for the Chesapeake and Ohio Railroad Company was ultimately discharged, and the said railway company was again operated by its own officers (Rec., p. 59).

The original declaration in this case was filed, as has been seen, on the 12th day of November, 1887; on the 14th day of the same month service of process was made upon one C. H. Chapin as agent of the defendant. It appears from the testimony of the witness H. W. Fuller (Rec., p. 58) as follows:

Just before the road went into the hands of the receiver, I was in the employ of the Newport News and Mississippi Valley Company. Mr. Chapin was in the employ of the same company, and before that in the employ of the Chesapeake and Ohio Company. Mr. Chapin was then also employed by the Chesapeake and Ohio Co. . . . Mr. Chapin had been in my service for several years before 1887.

"Soldier," the station near which the accident to the plaintiff, Laura P. Howard, happened, is a station on the line of the E. L. & B. S. Company, in Carter County, Kentucky, about 58 or 60 miles west of the Big Sandy river.

One of the passengers on the train, John Hurst, testified that, in his opinion, "Reckless running caused the accident, and possibly a damage to the car when we left Louisville" (Rec., p. 16).

Certain witnesses testified that the accident was due, not to any defect in the roadbed where it happened, but to a broken flange on the wheels of one of the cars of the through train (Rec., p. 15).

POINTS OF LAW AND OF FACT, AND ARGUMENT THEREON.

I.

Jurisdiction of the Trial Court.

It was urged by counsel for the defendant, upon the second trial of this case, that upon the whole Record before the trial justice it was his duty to declare that the court was without jurisdiction. While he did not entertain that view of the case, and refused to rule that the court had no jurisdiction, yet, inasmuch as the contention that upon the whole Record the court below had no jurisdiction will doubtless be renewed here, counsel wish at the outset to consider that point. As has before been shown, the defendant, on the 6th of December, 1887, filed two pleas, which were expressed to be "to the jurisdiction of the court" (Rec., p. 3). These pleas were not verified. This was a fatal defect.

Chitty on Pleading, pp. *433, *452.

Alexander's British Statutes, p. 661, 4th Ann. Cap. 16, Sec. XI, and p. 667 (note and authorities under Sec. XI).

See, also, Abert's Compiled Statutes, p. 460, Sec. 86.

They were interposed by counsel instead of being pleaded by the defendant in proper person.

This was an acknowledgment of the jurisdiction of the court.

1 Chitty on Pleading, p. 384.

Upon a reference to Thompson on Corporations (Vol. VI, Sec. 7507), it will appear that the weight of authority is to the effect that the return, by an officer competent to serve a return and writ of summons, of the fact and mode of service, if in due form of law, is conclusive upon the parties to the record, in all proceedings, except in an action against the officer for a false return. This is in conformity with the more general rule of common law, that the return of the officer upon any process in a case is conclusive on the parties to the suit, and can only be impeached in an action against the sheriff for a false return. Numerous authorities are cited by the author in support of this position.

Be this as it may, it is submitted that the proper course for the defendant was to move to vacate the service of the writ in question. As the defendant did not do this, but pleaded, as has been seen, to the jurisdiction, the said pleas were to be strictly construed. It is submitted that there was no error in the order made by the court on the 27th of January, 1890, by which order the said pleas to the jurisdiction were stricken out and judgment by default given against the defendant, and a jury of inquest ordered. In this condition of things the defendant's course was clear. If the court had no jurisdiction, the judgment was a nullity. If the defendant had no property within the jurisdiction, it could not even have been put to inconvenience by the issuance of an execution. Instead, however, of relying upon the alleged want of jurisdiction, the defendant, by its counsel, on the 15th of February, 1890, made a motion to have this judgment of default set aside. This was done, but only upon condition that the defendant would plead the general issue. Accordingly the defendant, under the said permission, on the said 17th day of the same month,

formally pleaded the general issue. Upon this point it is submitted that the case of Railroad Company *vs.* Brown, 17th Wallace, 445, 448, 450, is conclusive:

> "It is objected that the Circuit Court did not acquire jurisdiction of the defendant below for want of proper service of process. But this objection is not well taken, because the process was served on Stewart, a director of the road, and this service was in conformity to law. (10 Stat. at Large, 810, 3.) It is true the marshal does not return as a fact that Stewart was a director, only that he was reputed to be so, but the record shows that he was a director when the road was leased, and, in absence of proof to the contrary, it will be presumed this relation existed when the summons in this case was served. Even if the service were defective, the plaintiff in error is not in a position at this time to except to it. The record discloses that, soon after the action was commenced, a judgment by default was entered for want of a plea, and that the plaintiff in error appeared by attorney and moved the court to set it aside on the ground that there had been no sufficient service of process. This motion was denied for the reason stated, but the court ordered the default to be opened and the cause placed on the trial calendar, on the condition that the appearance of the plaintiff in error was entered by the receiver within a period of ten days. This order was, doubtless, made in order to give the company an opportunity to defend, and at the same time to set at rest the point raised about the service in case the merits of the action were tried. The condition thus imposed was complied with, and, for aught that appears, the subsequent litigation has been conducted on the part of the company by its voluntary appearance in every stage of the case."

This court has gone very far in sustaining service of process upon agents of non-resident corporations.

Barrow Steamship Co. *vs.* Kane, 170 U. S. 100.

See, especially, Mutual Life Insurance Co. *vs.* Spratley, 172 U. S. 602.

That the mere appointment of a receiver does not *ipso facto* dissolve the corporation for which it is appointed is well settled law.

Am. and Eng. Encyclopædia of Law, Vol. 20, p. 278.
Kincaid *vs.* Dwinelle, 59 N. Y. 548.
Pringle *vs.* Woolworth, 90 N. Y. 502.
Taylor *vs.* Columbia Insurance Co., 14 Allen, 353.
Jones *vs.* Bank of Leadville, 11 Colo. 464.
Hunt *vs.* Columbian Insurance Co., 55 Maine, 290.
Mosely *vs.* Burrow, 52 Tex. 396.
State *vs.* Merchant, 37 Ohio State, 251.
Davis *vs.* Gray, 16 Wallace, 203.
Railroad *vs.* Brown, 17 Wallace, 445.
Pa. Railroad Co. *vs.* Jones, 155 U. S. 333.
Chemical National Bank *vs.* Hartford Deposit Co., 161 U. S. 1.

It appears that the receiver was appointed in the present case on the 27th day of October, 1887, in Virginia, and on the next day in West Virginia. It does not appear, however, that any change whatever was made in the office of the defendant. On the contrary, it is established by the testimony of the witness, H. W. Fuller, already referred to that no change was made. It is not pretended that any ancillary proceedings were taken in the District of Columbia, or that any public notice whatever was given of the appointment of receiver.

An instructive case in this connection, being that of a dormant corporation in the hands of a receiver, subsequently revived, is that of Texas and Pacific RR. Co. *vs.* Bloom's Admr., 164 U. S. 636.

> "The rule in this country is said to be that receivers appointed by one jurisdiction are not entitled, as of right, to recognition in other jurisdictions; and that courts of equity cannot acquire extra-territorial

jurisdiction over property by appointing receivers."

Am. and Eng. Encyclopædia of Law, Vol 20., pp. 65, 66.

Atkins *vs.* Wabash, etc., RR. Co., 29 F. R. 173.

Booth *vs.* Clark, 17 Howard, 335.

A relevant case, involving the collusive appointment of a receiver (as here) for the purpose of wrecking a railroad, is Walters *vs.* Mortgage and Trust Co., 50 F. R. 316.

It is submitted that, under the circumstances detailed above, to permit the defendant to escape its liability by reason of an alleged defective service which yet remains uncontradicted of record, there having been no motion made to set it aside, would be unreasonable.

II.

Status of Scalpers' Tickets.

That Mrs. Howard was traveling upon a ticket bought from a "scalper" does not disentitle her to recovery. The Railroad Company received value for the ticket.

Sleeper *vs.* Penna. RR. Co., 100 Penn. St. 259.

III.

Liability of the Defendant.

Before considering technically the question of the liability of the defendant in this case, it will be well to state that question as it is practically put here.

The plaintiff, Mrs. Howard, bought in November, 1886, the defendant's through ticket from Louisville to Washington City. She bought it on the faith of the advertisement of the defendant set forth in the Record. She went to the railroad station to which she was directed by that advertisement. She expected to go through from the

one city to the other on the defendant's "fast line, leaving Louisville daily with Pullman cars and solid train to Washington, D. C. without change." When she reached the station in Louisville, to which she had been directed, she had her baggage checked through to Washington by that train. She saw there a train of cars placarded "Chesapeake and Ohio Train," and she entered the said train, and a little later gave up her ticket, which was a Chesapeake and Ohio Railroad ticket, to the conductor of that train. A few hours later that same train was derailed by reason of a broken flange on the wheel of one of the cars composing the said train. The defendant had her examined by its agents and paid her $200. When she brought her action against the defendant company, which at that very time was advertising in Washington City to the same effect substantially as it advertised in Louisville and which was circulating among the public the advertisement contained at page 44 of the Record (map), and which also, according to the statement of its general passenger agent "was a well-known line, and was being pushed and advertised for all it was worth," she was met by the technical plea next hereinbefore considered, and also by the further plea that she was suing the wrong company.

Now, let us consider the facts which confronted her original counsel when, after the deposition of Mr. Wickham (Rec., p. 26) was taken, he first learned of the alleged situation of these roads in November, 1886. If he had considered the advisability of suing the E. L. & B. S. Railroad Company, he would have been met by the contention that the accident did not occur, as is conceded, by reason of any defect in their road-bed. If, however, he had sued that company and had recovered judgment against it, his judgment would have been postponed to the rights of the alleged Newport News and Mississippi Valley Company, which was a lessee of the Kentucky road for a term of 250 years. If he had sued the alleged Newport News and Mississippi Valley Company, and had recovered judgment against it, he would

have realized a judgment against a body corporate which had no road-bed and no rolling stock of its own, but had merely a Connecticut franchise. When, on the other hand, suing, as he did, the corporation on whose ticket and on whose advertisements his client relied, he is met by the defense in this case. Surely railroad corporations are not entitled to hold themselves out to the public in one aspect and to present to those whom they injure another face, whose features are so confused as not to be recognizable.

Liability of Connecting Carriers.

> "The conclusions as to the liability of a carrier selling a through ticket over several connecting roads to a point beyond its own lines are by no means harmonious. The English doctrine, and that of some of the States, is that the carrier is liable for the performance of the contract of transportation through to the point of destination, and must therefore respond in damages in the event of the injury or delay of a passenger before reaching that point."
>
> American and English Encyclopædia of Law, Vol. 25, p. 1085.

At common law, as is well known, a common carrier of goods was subject to a very strict responsibility. According to the leading English case (Muschamp *vs.* Lancaster & P. J. RR. Co., 8 M. & W. 421), a contract by the initial carrier for liability beyond its line may be inferred by the jury from the fact that it accepts goods directed to a point off its line without by positive agreement limiting its liability to the transportation on its own line.

Elliott on Railroads, Vol. IV, p. 2226.

This rule has been followed by many American courts.

Elliott on Railroads, Vol. IV, p. 2227, and cases cited.

American and English Encyclopædia of Law, Vol. 25, p. 1086, cases cited under note 2.

The majority of our courts, however, have held in accordance with what is called the American rule, that the mere acceptance of goods directed to a point off the carrier's line is not a sufficient basis for the implication of a contract for extra-terminal liability, and that in the absence of an express contract, or of more significant facts or specifications than the fact of acceptance as the basis of an implied contract, the initial carrier is discharged by carrying safely to the end of its line and there delivering to the next carrier.

Elliott on Railroads, Vol. IV, p. 2227, and authorities cited under note 2.

American and English Encyclopaedia of Law, Vol. 25, p. 1086, and authorities cited under note 3.

The law of the Federal courts is undoubtedly in accordance with the American as opposed to the English rule.

Railroad Co. *vs.* Mfg. Co., 16 Wallace, 318, 324.

Insurance Co. *vs.* Railroad Co., 104 U. S. 146, 157.

Meirich *vs.* Michigan Central RR. Co., 107 U. S. 102, 106.

Pa. Railroad *vs.* Jones, 155 U. S. 333.

Perhaps the American rule is best stated in the following quotations: In Hartan *vs.* Eastern RR. Co., 114 Mass. 44, the court, by Wells, J., said.

> "Arrangements between connecting roads, forming a continuous line, by which passengers are enabled to procure 'through tickets' at the point of starting, and to proceed to their destination, beyond the line of the first road, without changing cars, are required for the accommodation of the public, as well as the convenience of the roads themselves. Such arrangements do not imply joint interests or joint responsibility. The obvious import of such a transaction is that the tickets for passage upon roads beyond its own line are sold by the first road as agent for the others. The obligations and responsibilities of a carrier of persons, over other roads than its own, are

not thereby assumed, unless its relation to those roads, by contract or otherwise, is such as to confer or at least to consist with that character."

Mr. Redfield states the law thus:

"As the general duty of common carriers of passengers is different from that of common carriers of goods, so the implied contract resulting from the sale of through tickets for passengers is different. In the case of the carriers of goods and the baggage of passengers, we have seen that taking the pay and giving tickets or checks through binds the first company ordinarily for the entire route. But in regard to carrying passengers, the rule is different, we apprehend. These through tickets in the form of coupons, which are purchased of the first company, and which entitle the person holding them to pass over successive roads with ordinary passenger baggage, sometimes for thousands of miles in this country, import, commonly, no contract with the first company to carry such person beyond the line of their own road. They are to be regarded as distinct tickets for each road, sold by the first company as agent for the others, so far as the passenger is concerned."

2 Redf. on Law of Railways (6th Ed.), Sec. 201.

See, also—

2 Wood's Railway Law, 1418.

Hutchinson on Carriers, Sec. 578.

2 Beech's Law of Railways, Sec. 1006.

In Nashville, etc., RR. Co. *vs.* Sprayberry, 9 Heisk. (Tenn.), 852, McFarland, J., in delivering the opinion of the court, said:

"The theory that the company selling the ticket shall be held, from this alone, to have actually contracted to carry the passenger over roads besides its own, and that the owners of the other roads are but the agents of the first to carry out the contract, seems to us to be an arbitrary assumption, a sort of

> legal fiction, and contrary, in some cases at least, to the truth of the case. Assuming that, in fact, the different lines of road are separate and distinct, and owned and controlled by different companies, with different agents and officers, and that there is no contract or privity between them in regard to carrying passengers, except the arrangement to sell through tickets, and that these facts appear in proof, shall the fact that the first company, with the authority of the others, issues and sells the tickets, be held of itself to establish exactly what may be contrary to the truth; *i. e.*, that the other companies are but the agents and servants of the first?"

Down to this point we have the following general principles established: First, that, according to the English rule, an arbitrary liability is imposed upon the carrier by the mere fact that it receives freight or passengers destined for a point beyond its own line; second, that the preponderating American rule excludes such arbitrary liability, and leaves the question of the liability of connecting carriers to be determined by the contract of carriage.

(*a.*)

Contract of through Carriage may be Implied.

As to what will, under the American rule, constitute a sufficient basis for the implication of a contract (for extra-terminal liability), nothing very definite can be said. A contract will not necessarily be implied even from the shipper's payment or guarantee to the initial carrier of through freight. An undertaking, however, in the receipt for the goods, to forward them beyond its line, is generally held to bind the initial carrier for the entire carriage. And the fact that the initial carrier named the through rate and collected the entire charge has been held in some jurisdictions, to be a circumstance strongly tending to show a contract for through transportation by it, or such a connec-

tion in business as to make the first carrier liable over the entire route.

As illustrations of circumstances which will constitute such a contract, the following cases are referred to:

Quimby *vs.* Vanderbilt, 17 N. Y. 306:

A part owner of one of several lines for transportation of passengers, running in connection over different portions of a route of travel, may contract as principal for the conveyance of a passenger over the entire route, and such contract may be established by the circumstances, notwithstanding the passenger receives tickets for the different lines signed by their separate agents.

Passage tickets are generally to be regarded as tokens rather than contracts, and are not within the rule excluding parol evidence to vary a written agreement.

I. & G. N. Rwy. Co. *vs.* Tisdale, 74 Texas, 8:

In this case the goods were injured on the defendant's road. It was held that the burden resting upon the plaintiff to establish a partnership or joint undertaking was sufficiently shown by a through bill of lading, through freight charges, and the fact that stock was to be carried in a designated car. To this may be added the fact of payment of freight charges to appellant's agent.

Contract on its face purported to be the act of L. & N. RR. and its connecting lines, executed by F. S. J., its agent.

Beggs *vs.* Narragansett G. S. Co., 5 Daly, 394:

Though a common carrier is not liable for loss of goods beyond its own line in absence of a special contract, yet such special contract may be shown by recitals in receipt for goods, the manner in which the way list is made up, and also from the fact that a through freight is charged and that the connecting carriers have a contract with each

other by which to carry freight through for a single price, to be divided between them.

Candee *vs.* Penna. RR. Co., 21 Wis. 582:

It seems that where a railroad company sells a through passenger ticket by a specified route to some point out of the State, over lines of road belonging to other companies, the undertaking of the first named company is to transport the passenger and his baggage safely to such place of destination, and that it is liable to him for any injury to his person or baggage, occurring on any of said connected lines, in violation of such undertaking.

Hill Mfg. Co. *vs.* Boston & Lowell RR., 104 Mass. 122:

The successive lines of three railroads, together with line of steamboat company, constituted a route between two cities. First company had a contract with second for mutual transportation of goods over their roads, and providing that first corporation might "bill freight through," the second agreeing to indemnify it for losses on its road. Goods were marked through, and way bill turned over to second road, which turned it over to third, which turned it over to steamboat company. First road collected entire freight, and after deducting its own charges gave residue to second road. No contract relation existed between first road and any other than second. *Held*, These facts warranted inference that first road was liable as common carrier over the whole route to a person from whom it received goods for transportation from the first city to the second.

Woodword *vs.* Illinois Central RR. Co., 1 Biss. 403:

Construction of bill of lading. *Held*, it was a through contract, since it specified the rate of freight to a more distant point than terminus of defendant road, and therefore bound the carrier to deliver it at the last point.

Page *vs.* Chicago, St. P., M. & O. RR., 64 N. W. R. 137 (S. Dak):

An agreement upon, and payment of, one entire and solid compensation to the place of destination, and the sending by the carrier of a car of the connecting line over which such freight was to pass, upon and after an agreement with the local agent that the shipper was to have a through car, so that the freight should not be subject to be unloaded or handled in transit, are circumstances sufficiently tending to show a through contract to entitle such evidence to go to the jury upon the question of whether or not the carrier made or recognized such a contract.

Nashua Lock Co. *vs.* W. & V. RR. Co., 48 N. H. 339:

Where several common carriers are associated in a continuous line of transportation, and in the course of business goods are carried through the connected line for one price under an agreement by which the freight money is divided among the associated carriers, in proportions fixed by the agreement; if the carrier at one end of the line receives goods to be transported through marked for a consignee at the other end of the line, and on delivery of the goods takes pay for transportation through, the carrier who so receives the goods is bound to carry them, or see that they are carried to their final destination, and is liable for loss happening on any part of the connected line.

A very instructive case in this connection is that of Railroad Company *vs.* Pratt, 22 Wallace, 123, 131. We quote from it so much as is directly applicable to the case at bar:

> "Second. Was there evidence in this case that the Ogdensburg and Lake Champlain Railroad Company did contract as a common carrier to transport this property beyond its own terminus over other roads to Boston?
>
> "*The weight, the force, or the degree of the evidence is not before us, if there was competent evidence, on which*

the jury might lawfully find the existence of the contract alleged (Dirst vs. Morris, 14 Wallace, 484; Mills vs. Smith, 8 Id. 27).

"Both the authority of Graves, the station agent, to make the contract, and the evidence of Pratt and others of the making of the contract, were questions of fact for the consideration of the jury. If the jury have found in the plaintiff's favor on these points, upon evidence legally sufficient to justify it, this court cannot interfere with their findings.

"The evidence on both these points may properly be considered at the same time. Pratt testified that he had for many years been in the habit of transporting horses over the defendant's road to Boston, to the number of two hundred a year, and that Graves had been the station agent at Potsdam for five or six years; that nearly a week before the present shipment Graves engaged to give him on that day two good stock-cars to carry his horses to Boston, and that the cars furnished by Graves had always come over these roads and delivered the horses in Boston, and that the arrangements made by him were recognized by the other roads; that Graves' office was in the Potsdam freight house, and that he paid the freight through, sometimes at Potsdam and sometimes at Boston; that on this occasion he agreed with Graves upon the price through to Boston, viz., $85 a car, and that a way bill was made out for the horses and cars to Boston at the price mentioned. Other witnesses give testimony in corroboration, which it is not necessary to refer to. Graves testifies that he was the station master at Potsdam, and that the cars were billed from Potsdam to Boston, via Concord, as per bill; that the price agreed upon was not paid in advance, but it might have been.

"The way-bill was headed thus: 'Way-bill of merchandise transported by Ogdensburg and Lake Champlain Railroad Company from Potsdam Junction to Boston, via Concord, March 28th, 1868.' It describes the two cars with horses, and as consigned to Pratt & Brigham, at Boston.

"We see no sound objection to the admission of this way bill as evidence. If a written contract, it

was not only evidence, but the best evidence of what the contract was. It was exhibited to Pratt before the cars were started, as a part of the transaction.

"If not a contract, it was an act done and a declaration made by the agent in the very act of transacting the business, and as a part of it, which brought it within the principle of the *res gestæ*.

"This evidence shows that the oral engagement was 'to carry his horses to Boston,' not to carry to Rouse's Point and thence to forward to Boston, but 'to carry' as well and as fully over the Vermont and Massachusetts roads as over the Ogdensburg road.

"Again, a specific price was agreed upon for transportation over the whole route. This was in accordance with the practice, and whether paid at Potsdam or at Boston was unimportant. This practice had been continued for years, and the jury had the right to hold the contract to be the same, without reference to prepayment or postpayment. The jury were justified in inferring that where a carrier fixes a price for transportation over the whole route, that he makes the entire contract his own. One who carries simply over his own line, and thence forwards by other lines, would ordinarily, the jury may say, make or collect his own charges and leave the remaining charges to be collected by those performing the remaining service. Receipt of the entire pay affords a fair presumption of an entire contract.

"The language of the way bill is quite expressive. It describes 'merchandise transported . . . from Potsdam to Boston.' Transported or carried are equivalent terms, and quite distinct from the idea of forwarding. Whether looked upon as a contract or as a declaration, or an admission simply, the way bill furnishes evidence that the Ogdensburg Company undertook to carry the horses to Boston.

"In Root *vs.* Great Western (*supra*, p. 131), in speaking of the contract to transport as a common carrier over other lines, the court say: 'Such an undertaking may be established by express contract, or by showing that the company held itself out as a carrier for the entire distance, or received freight for the entire distance, or other circumstances indicating an understanding that it was to carry through.'

> "We think there was competent evidence before the jury that the company undertook to carry this property to Boston; and the jury having found such to be the fact, the other companies are to be deemed the agents of the defendants, for whose faults they are responsible."
>
> See, also, the case of Railroad Co. *vs.* Androscoggin Mill Co., 22 Wall. 594.

But see especially the case of Railroad Company *vs.* Harris, 12 Wallace 65, where a railroad company ineffectually sought to escape responsibility by issuing coupon tickets restricting responsibility to certain proprietors as to certain parts of a continuous line.

(*b.*)

Railroad Ticket alone does not Constitute the Contract of Carriage.

Before resuming these authorities the court may be reminded that—

> "the settled opinion is that the passage ticket, in the ordinary form, is merely a voucher, token, or receipt, adopted for convenience, to show that the passenger has paid his fare from one place to another, and does not constitute the contract of carriage, although it may and often does have upon it some condition or limitation which enters into and forms a part of the contract. Accordingly, it is admissible to prove by parole evidence the terms of the contract in fact entered into between the carrier and the passenger."
>
> Am. & Eng. Encyc. of L., Vol. 25, p. 1075, and authorities cited under Note 1.

It necessarily follows that parol evidence may also be given of all the circumstances under which the ticket was purchased. What the real contract was will be shown not by the ticket alone, but by the ticket connected with the advertisements to the public authorized and made by the

railroad company, on the faith of which the public purchase tickets.

(*c.*)

Liability of Carriers of Passengers.

While the liability of a common carrier of goods is that of an insurer, and therefore greater than that of a common carrier of passengers, yet, when the question is concerning the contract of carriage, there is no difference.

> "Although a railroad company is not a common carrier of live animals in the same sense that it is a carrier of goods, its responsibilities being in many respects different, yet when it undertakes generally to carry such freight it assumes, under similar conditions, the same obligations, so far as the route is concerned over which the freight is to be carried."
>
> Myrick *vs.* Michigan Central Rwy. Co., 107 U. S. 102, 107.
>
> See, also, in this connection, Lawyers' Reports Annotated, Vol. 2, pp. 84, 85, 252, and notes and authorities there cited.

(*d.*)

How Provisions for Exemptions should be Interpreted.

With respect to the policy of the law, in considering provisions inserted by common carriers in receipts, tickets, notices and other similar instruments, the Supreme Court, in the case of Railroad Co. *vs.* Manufacturing Co., 16 Wallace, 318, 329, says as follows:

> "It is not only against the policy of the law, but a serious injury to commerce to allow the carrier to say that the shipper of merchandise assents to the terms proposed in a notice, whether it be general to to the public or special to a particular person, merely because he does not expressly dissent from them. If the parties were on an equality in their dealings

with each other there might be some show of reason for assuming acquiesence from silence, but in the nature of the case this equality does not exist, and, therefore, every intendment should be made in favor of the shipper when he takes a receipt of his property, with restrictive conditions annexed, and says nothing, that he intends to rely upon the law for the security of his rights.

"It can be readily seen, if the carrier can reduce his liability in the way proposed, he can transact business on any terms he chooses to prescribe. The shipper, as a general thing, is not in a condition to contend with him as to terms, nor to wait the result of an action at law in case of refusal to carry unconditionally. Indeed such an action is seldom resorted to, on account of the inability of the shipper to delay sending his goods forward. The law, in conceding to carriers the ability to obtain any reasonable qualification of their responsibility by express contract, has gone as far in this direction as public policy will allow. To relax still further the strict rules of common law applicable to them, by presuming acquiesence in the conditions on which they propose to carry freight when they have no right to impose them, would, in our opinion, work great harm to the business community."

See especially as to limitations in tickets, *in fine print*, the recent case of—

The Majestic, 166 U. S. 375.

In Michigan it is provided by statue that—

"No railroad company shall be permitted to change or limit its common law liability as a common carrier by any contract, or in any other manner *except by a written contract, none of which shall be printed*, which shall be signed by the owner or shipper of the goods to be carried."

Statues of Michigan, Compilation of 1871, p. 783, section 2386.

(*e.*)

Conclusions from Authorities Cited.

Recurring now to the authorities cited above on the main question, it may be admitted that where two or more railroads form an agreement in consequence of which they run through trains from point to point, the mere fact that they do run such through trains will not make one liable for the negligence of the other, where there is no partnership or agreement tatamount thereto existing between the said companies. That is, however, not the case which is involved here. Upon any theory of this case, the trial justice was compelled to submit to the jury the question as to what contract was in fact made or implied under all the circumstances of the case, by the purchase of the railroad ticket in question here.

> "In the present case, the court below held that by its receipt, considered in the light of the circumstances under which it was given, the Michigan Central Railroad Company assumed the responsibility of transporting the cattle over the whole route from Chicago to Philadelphia. It did not submit the receipt with evidence of the definite circumstances to the jury to determine whether such a through contract was made. It ruled that the receipt itself constituted such a contract. In this respect it erred."
>
> Myrick *vs.* Michigan Central RR. Co., 107 U. S. 102, 107.

IV.

Status of Newport News and Mississippi Valley Railway Company.

One theory which the plaintiffs urged with respect to this case involved the status of the Newport News and Mississippi Valley Co. It will be recollected that this company was chartered in the State of Connecticut, on March

27, 1884, and that its original charter contained a provision that it should not do business within the State of Connecticut. Of a similar charter granted by the State of Pennsylvania, the Supreme Court of Kansas had occasion to speak in the case of the Land Grant Railway and Trust Co. *vs.* Commissioners of Coffey County, 6 Kansas, 245. The plaintiff in this case was a corporation chartered under the laws of the State of Pennsylvania. The first section of its charter provided that the corporation might do business anywhere, except in the State of Pennsylvania, and the fourth section provided that it should establish its offices where its business was located. The court say:

> "From the only territory in the whole world, over which the State of Pennsylvania has any jurisdiction and control, and in which it could authorize a corporation to do business, it excludes this corporation. . . . The truth is it had no legal existence anywhere upon the face of the earth. At the very creation of this supposed corporation, its creator spurned it from the land of its birth as illegitimate and unworthy of a home among its kindred and sent it forth a wanderer on foreign soil. Is the State of Kansas bound by any kind of courtesy or comity or friendship to treat this corporation better than its creator has done? It can hardly be supposed so, when we come to see how carefully our own constitution has guarded the creation of a corporation in our own State."

It is true that an amendatory act was passed in 1887 adding to this proviso the following words:

> "Unless such railroad shall be held, owned, or operated within said State, in conformity with the provisions of the general laws of the State."

But it is submitted that this proviso does not remove the stigma placed upon the child by the parent at the moment of its birth.

In addition to these circumstances, we find this alleged railroad company having a lease of 250 years from the defendant company, and yet immediately surrendering the said lease and all of the rolling stock of the defendant to the receiver of the defendant only a little over a year after the said lease was made. We find that its president was also the president of the defendant, and that its other officers, so far as they are disclosed by this Record, were also the officers of the defendant. After the accident we also find the defendant negotiating with and paying money to the plaintiff, Laura P. Howard.

Now, it is urged that under these circumstances the plaintiffs were entitled to have submitted to the jury the question as to whether or not the defendant was really operating its own road from July, 1886, when the lease was made, until October, 1887, when the defendant was placed in the hands of a receiver.

If in fact the defendant company was also the Newport News and Mississippi Valley Company it would, in any view of the case, be liable for the accident in question; for, it will be recollected, the E. L. & B. S. Rwy. Co. does not appear from this Record to have been itself operating its road for many years.

In the early part of 1882 the defendant made a contract for five years, under which it operated this Kentucky road until the alleged Newport News and Mississippi Valley Company began the operation thereof. If, therefore, in point of fact, the defendant was the Newport News and Mississippi Valley Company, it was liable for the accident that happened upon it in November, 1886, at "Soldier," on the line of the E., L. & B. S. RR. Co.

As this question was one of the fraudulent existence of this Connecticut corporation, it was peculiarly within the province of the jury to find that fact.

Sonnentheil *vs.* Brewing Co., 172 U. S. 401.

V.

Estoppel Upon Defendant.

If, however, this theory be untenable, then it is contended that inasmuch as the plaintiff, Laura P. Howard, bought a Chesapeake and Ohio Railroad ticket, under the circumstances shown by the evidence in this case—to wit, the advertisements by the defendant in the public press; the circulation by it of the railroad map and circular set out in the Record, and the "pushing of the said Chesapeake and Ohio Railroad route for all it was worth"—the defendant company is estopped from asserting that it was not in point of fact itself operating a through line from Louisville to Washington and return, in November, 1886.

In this connection counsel refer to the case of Railroad Co. *vs.* Brown, 17 Wallace, 445, 451, and quote as follows from the opinion of the Supreme Court in that case:

> "Apart from this view of the subject, the ticket on which the plaintiff rode was issued in the name of the Washington, Georgetown and Alexandria Railway Co., as were all the tickets sold at both ends of the route, the holder of which ticket contracts for carriage with the company, not with the lessees and receiver. Indeed, there is nothing to show that Katharine Brown knew of the difficulties into which the original company had fallen, nor of the part performed by the lessees and receiver in operating the road. She was not required to look beyond the ticket, which contained the information that this road was run, as railroads generally are, by a chartered company. Besides, the company having permitted the lessees and receiver to conduct the business of the road in this particular, as if there were no change of possession, is not in a position to urge any question as to its liability for their acts."

In this connection counsel must again refer to what has been before said in this Brief to the effect that the defendant was not, at either end of the route in question, an initial

carrier by position; it was a mere connecting and subordinate link in any system operating between the two cities of Louisville and Washington. This position of intermediate carrier was abandoned by it, and the position of through and controlling carrier was assumed. To support this, reference need only be made to the advertisements, maps, and the general conduct of the defendant appearing from the Record, and hereinbefore specifically referred to.

Upon this point of estoppel the case of Sun Insurance Co. *vs.* Kountz Line, 122 U. S. 583, is especially applicable. In that case it is held as follows:

A person who conducts himself with reference to the general public in such a way as to induce others, acting with reasonable caution, to believe that he is a partner in a partnership, is liable as such to a creditor of the partnership who contracted with it under such belief, although he is not in fact a partner.

And in the particular case it was held that the proprietors of certain steamboats had so conducted themselves towards the public, in their business relations with each other, as to induce a shipper, acting with reasonable caution, to believe that they had formed a consolidation in the nature of a partnership, or were engaged as joint traders under the name of the Kountz Line.

Now, the most that can be said by the defendant, in opposition to the plaintiffs' claim upon this theory of the case, is that a jury might have inferred, from the testimony in the case, that the ticket actually bought by Mrs. Laura P. Howard contained statements to the effect that the defendant was not a through carrier, and that it stipulated against liability for any negligence but its own. Certainly, however, even on this hypothesis, it was the province of the jury to determine whether or not the purchaser of a ticket had a right to rely on the general conduct and advertisements of the defendant, rather than upon a printed form of statement contained in a ticket. So far as the stipu-

lation against liability for negligence is concerned, it may very well be satisfied by interpreting it as exempting the defendant from liability by reason of defects in the roadbeds of the subordinate railroads, if, indeed, it could operate to that extent.

If the position of the defendant was that of a through carrier, then certainly any stipulation in the ticket against its own negligence, in providing improper cars or improperly running its own train over the roads of subordinate and connecting carriers, would be invalid.

This is well settled law. The Supreme Court of the United States say, in the case of Hart *vs.* Pa. RR. Co., 112 U. S. 331, 338:

> "It is a law of this court that a common carrier may, by special contract, limit his common law liability; but that he can not stipulate for exemption from the consequences of his own negligence or that of his servants."

VI.

Injury Resulted from Defendant's Own Negligence.

It appears from the undisputed evidence in this case that the ticket in question was the ticket of the defendant. It further appears that the plaintiff went to the station advertised by the defendant as its station, and there took a train of cars marked by the defendant as its train, and that the accident in question occurred from a defect in the wheel of a car of that train, or from the negligent running of the train. Now, upon these facts, it is absolutely immaterial as to what the arrangements were between the defendant and the other roads in question. The stipulation testified to have been on the ticket would have been also immaterial because it was a stipulation against the negligence of others, and the negligence of an imperfect wheel was the defendant's own negligence.

Upon this theory of the case we have the defendant running its own through train, upon which it has invited passengers to enter, and for the composition of which it has furnished cars which it has labeled as its own. Is it conceivable that it can escape liability for its negligence in furnishing such car, by the fact that the car was running over subordinate and connecting roads?

Upon this point counsel refer to the following statement contained in the latest text-book on the subject, and to the authorities quoted in support thereof:

> "We suppose that where different and independent carriers run trains over the same road, and a person takes passage on one of the trains under a contract with one of the companies, that the company with which the contract is made is to be regarded as the carrier and answerable for injuries resulting from negligence in managing the particular train, although the company owning the road may be responsible for injuries caused by a negligent breach of duty in respect to the track, the road-bed, or the like. It is probable though that a passenger would have a right of action against the lessee company for injuries received while traveling on one of its trains, because of the negligence of such company in running trains over such track. According to the prevailing view, the passenger, in such a case, might maintain an action against both companies."
>
> Elliott on Railroads, Vol. 4, p. 2450.

Counsel also refer to the following authorities as illustrating the statement of the text:

> International & Great Northern RR. Co. et al. *vs.* Tisdale, 74 Texas, 8.

Suit to recover damages for failure to deliver a jackass and for injuries sustained in transit by a stallion. The suit was founded upon a special contract in writing, annexed to plaintiff's petition, which upon its face purported to be the act and deed of the Louisville and Nashville Railroad Com-

pany, and its connecting lines of the first part, etc., executed by one F. S. Jenkins, as its agent. Plaintiff alleged that Jenkins was the agent of the defendant as well as of the Louisville and Nashville Railroad Company; that the defendants were connecting carriers in the line from Franklin to Georgetown, and that an arrangement existed between all the carriers in said line by which through contracts of shipment could be made and by which each carrier along the line acted as the agent of the other carriers.

Held,—

> "Even if the burden of proof in this case was on the plaintiff to establish a partnership or joint undertaking between the defendants and the Louisville and Nashville R.R., as connecting carriers, this we think sufficiently shown by a through bill of lading or receipt from Franklin, Kentucky, to Georgetown, Texas, through freight charges, that the stock was to be carried in a designated car, which are said to be facts from which it may be inferred. Hutch. on Carriers, Sec. 152; Laws. on Carr., p. 357. To this may be added the further fact of the payment of the freight charges to appellant's agent at Georgetown."

Chollette *vs.* Omaha & Republican Valley RR. Co., 26 Nebraska, 159:

Suit for damages for personal injuries alleged to have been received from negligence of defendant's agents. The ticket was a single one, and was issued in the name of the Union Pacific Railway for a passage from Wahoo to Elkhorn. Defence was that defendant road was not operating a line of road as common carrier at the point of accident. It was further alleged that the Union Pacific Road was operating all of defendant's road at the time of the accident.

The station agent at Wahoo, where the ticket was punched, testified he was the agent of the Union Pacific Railroad, hired by the superintendent of that company, who was the same person as the superintendent of the

defendant company; that the defendant's road at place of purchase of the ticket was operated as a branch of the Union Pacific Railroad, and that the ticket was the usual character of ticket sold. It was further shown that there was no change of cars; that all the freight and passenger business of the defendant was reported to the proper auditing officers of the Union Pacific Company, who were also the auditing officers of the defendant; and that defendant's line ended a short distance from the place of accident.

Held,—

> "Though the ticket had 'Union Pacific Railroad' on it, yet there is nothing contained in it which necessarily shows it to be a receipt taken or voucher showing payment for passage, rather than a contract, and by its purchase the contract between the passenger and the carrier is said to be consummated. The contract is implied by law, except so far as it is expressed on the face of the ticket. The contract having been to convey plaintiff to Elkhorn from Wahoo, and a single ticket having been given, it would seem that plaintiff had the right to look to defendant for a fulfillment of such contract."

This case is distinguished by the court from Hood *vs.* Railroad Co., 22 Conn. 1, and stress is laid upon the fact that defendant placed plaintiff in a car for passage which was to, and did, transport her to her destination without change, and that the undertaking was clearly for such transportation, and the fact that the car would pass over the track of another company en route could make no difference.

Washington *vs.* Raleigh & Gaston RR. Co., 101 N. C. 239:

In this case there was a special contract made by defendant road to run a special train to a certain point and back. *Held*, that the fact that the injury sued on occurred during the trip while the train was on the road of another company would not preclude a recovery against the defendant.

Chicago, R. I. & P. Rwy. Co. *vs.* Groves, 44 Pacific R. 628:

A railroad company running a train in charge of its own servants on the track of another company by its permission, under an arrangement that the train dispatcher and operators employed by such other company may stop the train at pleasure at any telegraph station (the said operators being partly paid for by defendant on a wheelage basis, and all the employees of defendant being subject to examination by the other company) is yet liable for damages resulting in the death of a passenger on the train of such other company by reason of the engineer's negligence in running his engine into it, although the negligence of such train dispatcher and operators and of the crew of the train of such other company may have been greater than that of such engineer.

Howe *vs.* Gibson, 3 Texas Civil Appeals, 263:

Where two connecting roads are operated as one continuous line under one management, with the same employees, and are, so far as the public can observe, one line, and use coupon tickets compelling a continuous passage from stations on one road to stations on the other, both are liable in damages to a passenger who purchases such a ticket and is wrongfully compelled to alight from the train at a point distant from the station to which he has paid his passage.

Webb *vs.* Portland and Kennebec RR. Co., 57 Maine, 117:

A railroad company, where using the track and easement of another similar corporation for the purpose of running their own engine and cars, with their own employees, must be held to observe such precautions for the safety of the public at a crossing, as shall be fully equivalent to those required at the hands of the corporation whose road they are using.

Counsel also refer, in this connection, to the case of Railroad Co. *vs.* Barron, 5 Wallace, 90, 104.

And to the following cases:

Block *vs.* Fitchburg RR. Co. and others, 139 Mass. 308.

Tillett *vs.* N. & W. RR. Co. et. al., 24 S. E. Reporter, 111.

Murray *vs.* Lehigh Valley RR. Co., 66 Conn. 512.

Texas & Pacific RR. Co. *vs.* Ross, 27 S. W. Reporter, 728.

Mo. Pacific RR. Co. *vs.* Bond, 20 S. W. Reporter, 930.

Martin *vs.* L. & N. RR. and C. & O. RR., 26 S. W. Reporter, 801.

Barkington *vs.* C. C. & A. RR., 19 S. E. Reporter, 915.

Jacksonville RR. Co *vs.* Garrison, 30 Fla. 557.

In this connection reference is made to Volume 44, page 737, of the Lawyers' Reports, Annotated, where the court will find a monographic note upon the subject of the liability of the lessor of a railroad for injuries caused by the negligence of another company using the road under a lease, license or other contract, which reviews all of the authorities upon that point.

VII.

Conclusions.

It should seem from the above considerations that the plaintiffs were certainly entitled to have the jury find what the actual contract of carriage was, in view of the circumstances of the case, between the plaintiff, Laura P. Howard, and the defendant company.

The learned trial justice, in taking the case from the jury upon the second trial of the cause, found that, as a matter of law, all the testimony in the case showed such a contract between the plaintiff, Laura P. Howard, and the defendant, *as in law exempted the defendant from any responsibility* for the accident in question.

The only ground upon which he attempted to support his opinion was that the secondary testimony of the witness

Fuller established the contents of the ticket actually bought and used by the said plaintiff; and that upon the contents of that ticket as the court found them, the plaintiffs could not possibly recover.

It is thought by counsel for the plaintiffs that the learned trial justice, for whose ability counsel have the highest respect, gave to the case of Pennsylvania RR. Co. *vs.* Jones, 155 U. S. 333, an interpretation which is erroneous.

In that case the plaintiffs were postal clerks in a car attached to a north-bound passenger train of the Virginia Midland Railway Company. At a place called "Four Mile Run," about midway between the cities of Washington, D. C., and Alexandria, Va., a collision occurred between that train and a fast freight train of the Alexandria and Fredericksburg Railway Company, which resulted in serious injuries to the plaintiffs. This line of track from Washington to Alexandria was the property of the Alexandria and Washington Railroad Company, whose franchises, at the time of the collision and prior thereto, were in the hands of a receiver, who permitted other roads to use these tracks under certain agreements. The suits were brought against the Pennsylvania Railroad Company, the Baltimore and Potomac Railroad Company, the Alexander and Washington Railroad Company, the Richmond and Fredericksburg Railroad Company, and the Virginia Midland Railway Company.

The theory upon which the plaintiffs proceeded, in including these five companies in the actions, was thus expressed in the declaration:

> "For that heretofore, to wit, on the 19th day of February, 1885, and prior thereto, the said defendants were engaged as common carriers in the transportation of passengers, persons and freight upon and along the several lines of railroad belonging to said companies, and, among others, along the line of the road of the said Alexandria and Washington Railroad Company, running between the cities of

> Alexandria and Washington, under an arrangement or contract for their common benefit, the full and exact terms of which are unknown to this plaintiff, and by which they were jointly interested in the running and management of the said railroads."

It was not pretended by the plaintiffs that they were traveling upon any ticket or upon any train of the Pa. Railroad Co.; nor was it pretended that the other train was in anywise connected with that company. There was no attempt to show any contract or agreement between the plaintiffs and the Pa. Railroad Co. that the plaintiffs should be carried safely in the train of the Virginia Midland Railway Co. The liability of the Pa. Railroad Co. was sought to be found in an alleged existing agreement between that company and the other companies defendant, whereby the said companies were jointly interested in the running and management of the said railroads. Under these circumstances it was very properly decided by the Supreme Court that the plaintiffs, having no contract whatever with the Pa. Railroad Co., and not being in any train of that company, could not recover on the ground that the Pa. Railroad Co. was in law a part owner of the road upon which the accident happened, by showing that that company sold through tickets or advertised that it ran or connected with other trains of another company so as to form through lines. The point decided in this case is clear, but it has no application whatever to the case at bar.

VIII.

The Status of the Corporation Known as the Newport News and Mississippi Valley Railroad Company as Disclosed in the Third Trial of the Case.

Had the proof of the appellant been the same upon the third trial of the case, this pseudo-corporation would not have figured at all in the consideration of the jury, for as a matter of law its existence would have been disregarded. The question of fact for the jury to decide would have been

whether or not the appellant was operating the train on which the injured passenger was, without regard to the alleged lease from it to the Connecticut corporation.

But proof of the ratification by Virginia of this lease having been introduced, it is claimed by the appellant that the trial justice was bound to instruct the jury that the legal effect of this lease was to discharge the appellant. The trial justice left it to the jury to say whether or not, upon all the evidence, the apellant was in fact operating the Kentucky road in question at the given time.

What was the evidence on this point?

(In considering this evidence we will, for brevity's sake, call the Chesapeake and Ohio Railway the Virginia Company; the Elizabethtown, Lexington and Big Sandy Railroad the Kentucky Company, and the Newport News and Mississippi Valley Company the Connecticut Company.)

The Virginia and Kentucky Companies formed relations with each other at an early date. By act of the legislature of Kentucky, approved March 27, 1872 (Rec., p. 30), the Virginia and Kentucky Companies were authorized to bridge the Big Sandy River. By agreements dated November 12, 1879 (Rec., p. 31), and December 28, 1881 (Rec., p. 30), between the same companies, to one of which agreements the Louisville and Nashville Railroad Company was also a party, "a western outlet was afforded" to the Virginia Company over the line of the Kentucky Company. It appears also from the testimony of Mr. Fuller, general passenger agent of the appellant, that this part of the Kentucky road was built for the express purpose of making an outlet for the appellant (Rec., pp. 56, 63).

From the time of the constructing by the Virginia and Kentucky Companies of the few miles of connecting road provided for by the agreement of November 12, 1879 (Rec., p. 31), which construction was completed early in 1882, (Rec., pp., 27, 45), the road from Fortress Monroe (or Phoebus), in Virginia, to Lexington, in Kentucky, was a continuous system (Rec., p. 57).

As to the arrangements under which these railroads were run from the time named, early in 1882, until the making of the alleged lease, Mr. H. T. Wickham, a lawyer and director and general solicitor of the Virginia Company, whose deposition was taken by the defendant but read upon the third trial by the plaintiff, says (Rec., p. 45):

> "The properties were then operated together by one General Manager, Mr. C. W. Smith, under the verbal directions of Mr. C. P. Huntington, I have always understood, who was President of the Chesapeake and Ohio Company and controlled a majority of the stock of the Elizabethtown, Lexington and Big Sandy Railroad Company. Under the arrangement the officers of the Chesapeake and Ohio Company operated and maintained a line of railroad for and on account of the Elizabethtown, Lexington and Big Sandy Railroad Company from the west bank of the Big Sandy River to Lexington, and included in that also the 8 miles of track between the west bank of the Big Sandy River and Huntington. They operated it, as I have said, for and on account of the Elizabethtown, Lexington and Big Sandy Railroad Company, keeping an account on the books of the Chesapeake and Ohio Railroad Company of all receipts of every character between Huntington and Lexington, including also the Louisville connection, and charged to the Elizabethtown, Lexington and Big Sandy Railroad Company all disbursements in that part of the line. The arrangement continued in effect until the organization of the Newport News and Mississippi Valley Company, when its operating officers, who were General Wickham and Mr. Fuller, operated the properties under the lease. The duration of this contract was five years from the date of the completion of the road, which was in the early part of 1882, which would have made the duration until 1887. The organization of the Newport News and Mississippi Valley Company terminated the contract, I suppose, by force of the arrangement then made. It was terminated in the same manner it was made, by direc-

> tion of Mr. Huntington. Mr. Huntington directed Mr. Smith to operate the properties as I have indicated, and upon the formation of the Newport News and Mississippi Valley Company and the execution of the leases, he directed the operation of the line to be had in accordance with these leases. Mr. Huntington undoubtedly controlled the whole enterprise, in that he held a controlling interest in each company. He was President of the Chesapeake and Ohio Railroad Company, the President of the Newport News and Mississippi Valley Company, and Mr. Reid, who was the President of the Elizabethtown, Lexington and Big Sandy Company, acted always in Mr. Huntington's interest. The leases were prepared under the direction of Mr. Huntington and expressed, as far as they went, his desires toward the completion of the plan he entertained."

It will be observed that, upon this testimony, if the leases to the Connecticut Company from the Virginia and Kentucky Companies were not valid, then the Virginia Company was undoubtedly operating the Kentucky road in November, 1886, for this agreement was not to end until, at the earliest, January, 1887 (R. 45).

Such being the situation on January 29, 1886, and on June 15, 1886, when the leases in question from the Kentucky and Virginia Companies to the Connecticut Company were made, we proceed to inquire as to the status of these leases.

(1) Has the invalidity resulting from the discrediting act of the parent of the Connecticut Company at the time of its birth been removed by the testimony adduced for the first time upon the third trial of this case?

Let us first consider the action had by the legislature of Virginia.

The act in question was approved May 14, 1887, and provided that it should be in force from the day of its passage (Rec., p. 76). A proviso, in the enacting clause itself, to its taking effect was that the Connecticut Company should pay

all taxes against the Virginia Company in lawful money and not in coupons. No proof whatever was offered of a compliance with this proviso. As the proviso was in the enacting clause itself, the failure to make such proof was fatal.

Dwarris on Statutes (Am. Ed.), p. 119.

Moreover, it was specially provided that it should take effect from the date of its passage. It could not, therefore, relate back to November, 1886, so as to affect prior rights. Remedial statutes are not to be given a retroactive effect unless the legislative intent to this effect is clear.

23 Am. and Eng. Encyl. of Law, 448, and cases cited in note 4.

Ibid. 452, and cases cited in note 5.

In West Virginia reliance is placed upon certain general provisions of law (Rec., pp. 73–76), which must be construed as applicable only to foreign corporations validly organized. The Supreme Court of the United States has, in the case of Oregon Railway Company *vs.* Oregonian Railway Company, 130 U. S. 1, 26–27) adverted to the slender support which can be gained from such *ex parte* and perfunctory proceedings.

In Kentucky no legislative action is produced. Inasmuch as the accident occurred in this State, it would seem that the case remains in this respect as it was before.

It may well be claimed, then, that these leases have gained no validity, for the purposes of this case, by any proof introduced by the appellant upon the second trial of this case.

Upon the general subject of leases by public corporations, and their authorization by express language of their charters or by acts of the legislature, the following are controlling cases:

Thomas *vs.* Railroad Co., 101 U. S. 71.

Branch *vs.* Jessup, 106 U. S. 468.

Pennsylvania Railroad *vs.* St. Louis, etc., RR., 118 U. S. 290.

Oregon Railway *vs.* Oregonian Railway, 130 U. S. 1.

Central Transportation Co. *vs.* Pullman's Car Co., 139 U. S. 24.

St. Louis, etc., RR. Co. *vs.* Terre Haute, etc., RR. Co., 145 U. S. 393.

Union Pacific Railway Co. *vs.* Chicago, etc., RR. Co., 163 U. S. 564.

Suppose, however, that these leases have a *prima facie* validity. Can it be claimed that they operate in law to cut off all inquiry into the fact as to what company operated the Kentucky road in November, 1886?

It will be noted that the leases make express provision that both the Virginia and the Kentucky Companies shall keep up their respective corporate organizations under the laws of the States of Virginia and Kentucky, and in fact parts of the annual rentals of $5,000 are explicitly applied to this purpose (Rec., pp. 37, 32). There was nothing impossible in the continued operation of the Kentucky by the Virginia roads, notwithstanding the lease to the Connecticut Company.

Railroad Co. *vs.* Brown, 17 Wallace, 445.

Penna. RR. Co. *vs.* Jones, 155 U. S. 333.

There was, then, no reason in law why the trial justice should not have submitted to the jury the question as to what company operated this Kentucky road in November, 1886.

Was this submission justified by the facts in evidence?

Let us group these facts.

Collis P. Huntington was the originator, promoter and sole manager of a scheme of railroad tactics which this Record discloses (Rec., p. 46). He was president of the Virginia Company and he controlled the president of the Kentucky Company (Rec., p. 46). It does not appear that the Virginia

Company was in any financial embarrassment when Huntington, for purposes of his own, got his Connecticut charter. He was president of the Connecticut Company so chartered (Rec., p. 46), on March 10, 1885.

This Connecticut Company never owned a foot of track a car or engine (Rec., p 25), nor is their any proof in this case that any witness ever saw a share of its stock.

The officers of the Virginia Company became the officers of the Connecticut Company until the Virginia Company went into the hands of a receiver, and then they became the officers of the receiver; the Virginia Company came out of the hands of the receiver and then they became again the officers of the Virginia Company (Rec., pp. 14, 26, 27, 45, 51, 55, 57, 58, 60).

The Virginia Company gave the Connecticut Company a lease (signed by C. P. Huntington for both companies) for 250 years of all its rolling-stock, tracks, etc., on June 15, 1886 (Rec., p 36), and went into the hands of a receiver in October, 1887 (Rec., p. 81). Yet at once the Connecticut Company, having an unexpired term of over 248 years surrendered that term and all the rolling-stock, etc., to the receivers and disappeared from the scene. The receivers ran the road for awhile and in 1888, when they were discharged and the case dismissed, restored all of this property to the appellant (Rec., pp. 25, 26), who resumed business under its own management (Rec., p. 59).

Upon inquiry as to how the Virginia Company, apparently solvent in June, 1886, when the lease from it to the Connecticut Company was made, came into such desperate straits that in October, 1887, it was necessary to have a receiver appointed, we find from the Record (pp. 77, 78) that on October 27, 1887, this same Collis P. Huntington, its president, got a judgment against it for $1,756,034.16. On the same 27th day of October its president as a creditor filed a bill in equity against the Virginia and Connecticut Companies to appoint a receiver, and still on the same day the

Virginia and Connecticut Companies complacently waived service of process and, consenting to an immediate hearing of the cause, without any testimony, offered no objection to the appointment of receivers and the transfer to them of all the rolling-stock, road-bed, etc., of the Virginia Company. Similar action was had in West Virginia (Rec., p. 84).

The Connecticut Company went out of existence in 1892 (Rec., pp. 25, 41).

During all of this time the Virginia Company's office had been continued under the same name in the city of Washington (Rec., pp. 14, 24).

The Virginia Company had advertised, by a map, that its road ran from Fortress Monroe to Lexington (Rec., pp. 44–45, map) until at least November 21, 1886. It had advertised in the Washington and Louisville papers that it was running through trains from Washington City to Louisville (Rec., pp. 20, 21, 22) until after the accident in question here (see, also, map, pp. 44, 45). Finally it sold the ticket in question.

In this same connection the following testimony is pertinent. Mr. Fuller, the appellant's general ticket agent, says (Rec., p. 24):

> "We always used 'Chesapeake & Ohio Railway.' It is simply a trade-mark. We might as well advertise the P. D. Q. Route as the Newport News and Mississippi Valley Company. The public would not know where it was located or how to get there."

This same witness says, again explaining the reason why the words Chesapeake and Ohio Railway were used on the map in evidence (Rec., p. 56):

> "The Newport News and Mississippi Valley road was something that the public did not know anything about for years. Whereas the Chesapeake and Ohio Railway has been there for fifty or sixty years, and the general public knew where the White Sulphur Springs was and all those other places, and we just simply let it go along."

The witness, Yarrington, who was superintendent in November, 1886, of the Kentucky Railroad, says (Rec., p. 15):

> "I was railroading in November, 1886, on the 'Elizabethtown, Lexington and Big Sandy Railroad,' and I was superintendent of the division operated at the time, I believe, by the C. & O. Railway."

This answer is given in response to a question of appellant's counsel who examined him as its witness. In answer to the next question, which is in the nature of a remonstrance with and a caution to the witness, he says: "I am not clear as to which," meaning as to which road was then operating the Kentucky road. His first voluntary statement is valuable.

The witness John Hurst, who was a passenger on the same train with the plaintiff in November, 1886, says (Rec., p. 16): "The route was called Chesapeake and Ohio."

The witness David Thorburn, who was also a passenger at the same time, says (Rec., p. 17):

> "I travelled on the C. & O. Railroad, but when I got on this road, or how long I travelled on it, I am unable to state."

The witness Olmstead, a "scalper," who sold Mrs. Howard the ticket in question, says (Rec., p. 19) that at the time in question, November, 1886, he is almost positive that the appellant was selling tickets in its own name, and he says further that the road was known to the public at that time as the Chesapeake and Ohio route. Answering further, he says; "The names of these routes were changed so often that I did not keep track of them." Further:

> "Chesapeake & Ohio tickets were good over that part of the road (from Lexington to Huntington) as they are now" (April 11, 1894).

The witness Carr, a brakeman on the Kentucky road in November, 1886, says that the Connecticut road professed to take charge of the Virginia and Kentucky routes. In answer to a question, "You continued to get your pay the same way as before, didn't you?" said,

> "Yes, sir, the pay car came round—the same system and the same people. Mr. Patterson was the paymaster."

Going on to occurrences after the accident, Dr. Brock, upon the testimony of two witnesses (Rec., p. 12, Mrs. Howard; 16, John Hurst), told Mrs. Howard that he was surgeon of the Virginia Company, and dealt with her as such on the day after the accident and subsequent thereto. Mr. Frank Trigg, at the Virginia Company's Washington office, responded to business connected with this accident in November or December, 1886 (Rec., p. 14). In November, 1886, this same Mr. Trigg came to see Mrs. Howard as to her injuries (Rec., p. 12), and said he would send Dr. Brock to see her, after which Dr. Brock came.

In New York, the Virginia Company's attorney, Charles H. Tweed, on March 7, 1887, wrote to Mr. M. L. Armstrong, acting for Mrs. Howard, asking permission for Dr. Meredith Clymer to see Mrs. Howard (Rec., p. 47). Dr. Clymer did see her in behalf of the Virginia Company (Rec., pp. 48, 49), and his statement is corroborated by his report (Rec., p. 49) put in evidence by counsel for the appellant.

Finally, there is the testimony of Mrs. Howard that the very train on which she got, in pursuance to the Virginia Company's advertisement in the Louisville Courier-Journal telling where to go to take its train, was labeled with the Virginia Company's name.

How was it possible for the trial justice, in the face of these facts, to say to the jury that as matter of law the Connecticut Company was operating this train and this Kentucky road?

VIII.

The Effect of the Release Executed by Mrs. Howard.

Upon the first trial of this cause it was determined as a matter of law that the alleged release was invalid to bar the rights of the plaintiffs below, appellees here. Upon the second trial evidence was submitted as to the circumstances under which the release in question was made. It appears from the Record (Rec., p. 12, 13, 50, 52, 53) that Dr. C. W. P. Brock saw Mrs. Howard after the accident and on the line of the Virginia railroad. He then made an examination of her injuries and supposed that they were slight. A few days afterwards, upon the direction of Mr. Wickham, he again saw Mrs. Howard for the purpose of attempting to make a settlement with her, and took in his pocket $200 for that purpose. He found her in bed. The testimony of Mrs. Howard is that she was suffering intensely; that the room was darkened, and that Doctor Brock told her that he had called to see her in behalf of the railroad company and was instructed to give her $200 to "tide her over," and that he wanted her to sign a receipt; that she did not read this receipt, and that her physical condition was such that she could not have read it. Mrs. Howard testified that she did not know that this paper which she signed was claimed to be a release until after she had brought this suit (Rec., p. 85). Doctor Brock contradicts Mrs. Howard on this point. But he is himself contradicted on a very material point. He insists (Rec., p. 50) that there was another woman in the room with Mrs. Howard at the time of his visit when the paper in question was signed. The woman meant by him and the only woman that could have been there was the witness Mrs. Warder, who, at page 84, testifies distinctly that she was not in the room at the time, nor was there any other person there save Mrs. Howard and Doctor Brock. It will be recollected that Doctor Brock is contradicted on another very important matter, to wit, that he did not state

to Mrs. Howard, at the time of the accident, that he was the surgeon of the appellant. The witness Hurst (Rec., p. 16) distinctly says that Doctor Brock said at the time that he was then the appellant's surgeon. It is further evident from the testimony of Doctor Brock that (Rec., pp. 51, 52) the part assigned to him in this transaction was not one that came within the professional duties of a railway surgeon. The court is asked to read in detail the statements of Mrs. Howard (Rec., p. 12) and of Doctor Brock (Rec., pp. 50, 51, 52) in this connection.

Upon this testimony the trial justice instructed the jury as follows (Rec., pp. 88, 89):

> "If you shall find from the evidence that at the time the plaintiff executed the release given in evidence she was in bed and ill, and suffering to such an extent that it was a reasonable act upon her part to sign the paper without reading it, and for that reason she did not read it, but relied upon the representations of its contents made by Doctor Brock, and that the latter did not read it to Mrs. Howard, but stated to her that it was a receipt for two hundred dollars which he paid her at that time, and that she relied upon said statement and signed the release under the belief that it was a receipt only, and did not know that it was a release until some time afterwards, then the said release was at the time she signed it and is now void as a release, and can not prevent the plaintiffs from recovering if the jury shall find them otherwise entitled; but if Mrs. Howard was in such physical condition as to make it unreasonable, in your judgment under the evidence, for her to rely upon the representations of Doctor Brock, instead of reading the paper, or if Doctor Brock read it to her, or if he told her it was a release, then in either of these events it is valid and bars the action, and your verdict should be for the defendant without inquiring further."

This instruction of the court is in exact accord with the opinion of the Supreme Court of the United States in the

case of the Union Pacific RR. Company *vs.* Harris, 158 U. S. 326.

The case of Mullen *vs.* Old Colony RR. Co., 127 Mass. 86, is directly in point, and conclusive.

This court, in Lyons *vs.* Allen, 11 App. D. C. 543, decided that where a person executed a release intentionally, but induced thereto by fraudulent representations, he must restore the consideration received or put the other party in *statu quo* before he can avoid it. In that case the court relies upon Drohan *vs.* Lake Shore, etc., RR. Co., 162 Mass. 435, which distinguishes the case of Mullen *vs.* Old Colony RR. Co., *supra*. The distinction is the well-settled one between a case where a person is fraudulently led to do one thing, supposing he is doing another, and a case where a person does what he intends to do, but is led thereto by fraudulent inducements.

Bishop on Contracts, Secs. 645, 671.

In the former case the contract is absolutely void, and it is not necessary to pay back any money received as a prerequisite to suit. Indeed, such payment would have been impossible in the present case, since Mrs. Howard testifies (Rec., p. 85) that she did not know this paper was alleged to be a release until after this suit had been brought.

Further authorities in support of the appellees' position are—

20 Am. & Eng. Encyc. Law, 761–764, and cases there cited.

O'Donnell *vs.* Clinton, 145 Mass. 461.

Smith *vs.* Holyoke, 112 Mass. 517.

Lusted *vs.* Chicago, etc., RR. Co., 71 Wis. 391.

C. I. & P. RR. Co. *vs.* Lewis, 109 Ill. 120, 130–134.

Two hundred dollars in gold were tendered by the plaintiff to the counsel for the appellant on the occasion of the last trial, which tender was declined by counsel without assigning any reason for such refusal (Rec., p. 87). Further,

counsel for the appellant made no point whatever upon this trial with respect to any failure to tender the said sum, but contented himself with the assertion that the said release was valid in law. Nor did counsel for the defendant object to the admission of this evidence as to the circumstances under which this release was given. It is too late to make that objection for the first time in an appellate court. In this court authority upon that point need not be cited.

Even, however, if the learned trial justice erred in submitting this question to the jury as one of fact, it is submitted it was a harmless error, provided the alleged release be inoperative in law. Upon reference to the opinion of this court in this case it will be found that the court followed the opinion of the General Term of the District of Columbia, in the case of Snashall *vs.* Metropolitan RR. Co., 19 D. C. 407, in regard to its construction of the Married Woman's Act (Sec. 727–730 R. S. D. C.) in respect to the inability of a married woman to give a valid release for personal injuries sustained by her. That case was considered by this court in the case of Metropolitan RR. Co. *vs.* Snashall, 3 App. D. C. 435. The court, however, at that time declined to consider whether the right of property in a cause of action for personal injury accruing in another State must be determined by the law of the forum, or the domicile of the injured party, or of the place of the contract and injury. There was before the court at that time no proof with respect to the laws of Kentucky or Indiana as regards the property rights of married women.

At the present trial counsel for the appellant gave in evidence (Rec., p. 77) Sections 5130 and 5131 of the Revised Statutes of Indiana, under which the money recovered in such a case as this at bar would be the separate property of the plaintiff, Mrs. Howard; also (Rec., p. 77) Chapter 1768 of the Acts of 1873 of Kentucky, which does not change the rule of the common law with respect to the right to recover for injuries inflicted upon married women. It

would appear from this proof that, conceding the domicile of origin of Mrs. Howard to be in Indiana, she would—had the accident occurred in Indiana—been entitled to sue alone for damages resulting to her therefrom. As, however, the accident occurred in Kentucky, and as the appellant itself selected the temporary domicile of Mrs. Howard, to wit, the District of Columbia, as the place of the contract which it, the appellant, was about to make with Mrs. Howard, it is submitted that the law of Indiana does not apply.

This question was fully considered by the General Term in Snashall *vs.* Metropolitan RR. Co., *supra*, and the conclusion reached that the capacity of a party to contract should be determined by the *lex loci contractus* and not by the *lex domicilii*. This view, while perhaps contrary to the views of a majority of the civil jurists, is supported by practically the unanimous voice of the American text writers and the decisions in this country. Even in Louisiana, where the civil law prevails, it was held in the case of Andrews *vs.* His Creditors, 11 La. Reports, 464, overruling the earlier cases, that contracts entered into in other States, were, as related to the capacity of the contracting parties, to be governed by the *lex loci celebrati contractus*.

The following authorities strongly support the same view:

Story on Conflict of Laws, Sec. 101–103 and notes.
Parsons on Contracts, Vol. III, 573–578.
2 Kent's Com. 453 *et seq.*, 459n (*b*).
Pearl *vs.* Hansborough, 9 Humph. (Tenn.) 426.
Milliken *vs.* Pratt, 125 Mass. 374.
Bell *vs.* Packard, 69 Me. 105.
Campbell *vs.* Crampton, 18 Blatchford, 150.
Naylor *vs.* Baltzell, Taney, 61.

The judgment of the Court of Appeals, to which this writ of error has been sued out, can not be adquately reviewed until the court shall have considered its judgment and

opinion when the case at bar was before it for the first time. This opinion will be found reported in 11 App. D. C. 300. For the convenience of the court this opinion is reproduced here, divided into sections corresponding to the questions involved upon this hearing.

Court of Appeals of the District of Columbia.

WILLIAM HOWARD ET UX., APPELLANTS,
vs.
THE CHESAPEAKE AND OHIO RAILWAY CO.

No. 657. Decided November 1, 1897.

APPEAL by plaintiffs from judgment of the Supreme Court of the District of Columbia, at Law, No. 28,242, entered upon a verdict directed by the court in an action for damages for personal injuries. *Reversed.*

Mr. R. Ross Perry, Mr. James F. Smith and *Mr. R. Ross Perry, Jr.*, for appellants.

Mr. W. Willoughby, Mr. —— *Payne* and *Mr. Leigh Robinson* for appellee.

Mr. Justice SHEPARD delivered the opinion of the Court:

I.

Statement of Case by Court of Appeals.

William Howard and Laura P. Howard, his wife, began this suit in the Supreme Court of the District of Columbia, on November 12, 1887, to recover damages for injuries sustained by the said Laura. The declaration alleged that defendant, from and after November 16, 1886, operated a line of railway as a common carrier for hire, between Louisville, Ky., and Washington, D. C.; that defendant, for the customary fare, then and there paid by said Laura P. Howard, contracted with her to safely carry her from Louisville to Washington; that she took passage on defendant's train at Louisville on November 18, 1886, for transportation as aforesaid; that defendant did not carry her safely, but, by reason of the negligence of its employees and the use of defective machinery, caused the car in which she rode to be derailed and thrown down an embankment at or near the

station called Soldier in the State of Kentucky, whereby she sustained permanent injury.

The summons to defendant was returned by the marshal of the District, with the endorsement: "Served the Chesapeake and Ohio Company by service on C. H. Chapin, agent, November 14, 1887."

December 6, 1887, defendant filed two pleas entitled "pleas to the jurisdiction," alleging (1) that it is a foreign corporation, incorporated under the laws of the States of Virginia and West Virginia, and subject to the jurisdiction of the courts of said States; and that on October 27, 1887, in the Circuit Court of Henrico County, Virginia, and on October 28, in the Circuit Court of Kanawha County, West Virginia, in proceedings in equity in said courts, respectively, of which they had jurisdiction, decrees were passed appointing William C. Wickham receiver of defendant, and delivering to him the possession of all of its property; that said receiver took possession of the property and has operated the defendant's road since said date; and that at the time of the service of summons the said Chapin was not the agent of defendant, nor a person conducting its business, but was the agent of said receiver. (2) That defendant, as such foreign corporation, is subject to the jurisdiction of the courts of said States of Virginia and West Virginia, "and does not submit to the jurisdiction of this court, and was not, at the time of the alleged service of the process, November 14, 1887, doing business within the District of Columbia."

The said pleas had not been sworn to, and on January 27, 1890, the court sustained a motion to strike them out and entered an interlocutory judgment of default with order of inquest by a jury. On February 15, 1890, the court, on motion of defendant, vacated this order, "for the purpose of permitting the defendant to plead the general issue, and for no other purpose;" and ten days were granted therefor. The plea was promptly filed.

On May 13, 1890, plaintiff filed an amended declaration, substantially the same as the original, but substituting for the allegation therein that defendant had contracted to carry plaintiff for the customary fare paid, &c., the following: "The said Laura P. Howard purchased from the agent of defendant at said city of Louisville a ticket entitling her to passage upon the said railway from the said

city of Louisville to the said city of Washington, and the defendant thereby became bound to safely carry her," and so forth.

The defendant filed three pleas to the amended declaration, "not waiving its rights under former pleas:" First, not guilty; second, limitation of three years elapsing between date of injury and the filing of the amended declaration; and third, of accord and satisfaction for that, on November 24, 1886, the said Laura P. Howard, for the sum of $200, paid to her, had by writing under seal fully discharged defendant of all liability, &c.

The case came to trial on December 22, 1896, and judgment was rendered in favor of defendant upon a verdict directed to be returned by the court. The evidence upon which the verdict was ordered to be returned for the defendant shows the following:

Plaintiff, Laura Howard, lived at Jeffersonville, Indiana, and in 1886 was a clerk in the Department of Agriculture at Washington. She visited her home on leave in the fall of 1886, and started to return about November 16. Having seen an advertisement in the Louisville Courier-Journal of the schedule of the Chesapeake and Ohio Railway Company, between Louisville and Washington, she concluded to return that way. In the morning she purchased at the office of one Maeder, a "ticket broker or scalper," in Louisville, a coupon return ticket over the C. & O. road from Louisville to Washington, paying therefor $16.50. She procured a sleeping car berth and had her baggage checked through on said ticket. At 7 p. m., November 16, she entered a car in a train scheduled to leave at 7.30, and designated as "Chesapeake and Ohio train." Her ticket was taken up by the conductor and could not be produced. The car was derailed during the night near Soldier, in the State of Kentucky, and plaintiff sustained injury to her spine that has been pronounced incurable by an eminent specialist. While in New York, under his care, she was visited and examined by another surgeon, Dr. Clymer, at the instance of the defendant. A railway officer who saw the ticket on the day of its purchase said: "It was a C. & O. ticket. It was the return portion of a ticket sold in Washington, good for transportation between Louisville and Washington. The ticket purported to be issued by the C. & O. Rwy. Co., as appeared on its face."

Advertisements signed by H. W. Fuller, General Passenger

Agent of defendant, and published by his authority, were read in evidence. The first, in Washington Daily Post, from July 1 to November 16, 1886, inclusive, showed that the C. & O. Rwy. leaves B. & P. depot daily for Newport News and other places in Virginia and the West—"solid trains with Pullman sleeper to Louisville." The second, in Courier-Journal, November 13, 1886, was headed "Chesapeake and Ohio Railway," and contained among other things the following: "Only line running solid trains between Louisville and Washington," with a schedule showing arrivals in and departures from intermediate cities.

There was testimony tending to show that the derailment of the train was caused by the broken flange of a wheel on one of the cars, and some also tending to show that the car was not in good condition when it started. The first surgeon who treated plaintiff said that he was the surgeon of the C. & O. road. It was proved that Frank Trigg was known in Washington in November, 1886, as local agent of the C. & O. Rwy. Co. He was in the office of that company at the corner of Sixth street and Pennsylvania avenue, with the sign over the door, "Chesapeake and Ohio Railway Company." Trigg responded to all inquiries concerning the business of the C. & O. Railroad.

A witness, (whose deposition, taken by plaintiff, was read by defendant) testified that he sold Mrs. Howard the ticket —"a regular issue of the C. & O. Rwy." The form of the ticket was 758c, number 84, with two or three coupons. "The route was known to the public as C. & O." He said further: "The names of those roads were changed so often that I didn't keep track of them. The western division terminated at Memphis, and the C. & O. eastern division terminated at Washington, although I think they ran over another road from Charlottesville, into Washington, although we termed it C. & O.; and that is what we term the C. & O. route." He further said that he presumed the eastern division of the Newport News and Mississippi Valley Company was in 1886 where it is now, from Lexington to Huntington and Ashland, "bat we call that C. & O., and C. & O. tickets were good over that portion of the road as they are now."

On behalf of the defendant, it was shown that the baggage car, smoker and ladies' coach of the derailed train had the name, "Newport News and Mississippi Valley Company," along their sides.

The decree of the Circuit Court of Henrico County, Va., rendered October 27, 1887, shows the appointment of Wickham as receiver of the C. & O. Rwy. Company, and the acceptance thereof with bond. The suit was entitled Collis P. Huntington, plaintiff, *vs.* The Chesapeake and Ohio Railway Company and the Newport News and Mississippi Valley Company, defendants.

The following receipt was read by the defendant:

Received, November 24, 1886, of the Newport News and Mississippi Valley Company two hundred $\frac{0}{100}$ dollars, in full compromise, satisfaction and discharge of all claims or causes of action to me accrued against them, their lessors or predecessor companies, and particularly of all claims or causes of action arising out of personal injuries received by me while a passenger on the cars of the company near Soldier Station, Kentucky, which occurred on the night of 16th November, 1886. Witness my hand and seal.—Laura P. Howard. [Seal.] Witness: C. W. P. Brock.

Concerning this receipt and the circumstances under which it was executed Mrs. Howard testified:

She was extricated from the car by two men, who lifted her through the window and carried her down a ladder. She was afterwards taken on board the car of the superintendent of the railway, and she was there examined by Dr. Brock, who told her that he was the chief surgeon of the C. & O. Rwy. Co., and that he was on his annual tour of the railway at that time. She was transferred afterwards from the superintendent's car to another sleeping car and reached Washington city aforesaid early in the morning of November 18th. Witness was taken to 1806 11th street, in said city, where she remained confined to her bed. She was visited there a day or two after her arrival by Mr. Frank Trigg, who was the local agent of the C. & O. Rwy. Co., who conferred with her as to her injuries. The next day Dr. Brock called and offered her $200, stating that it was for the purpose of "tiding her over the time she was kept from her employment." He presented a paper already prepared for her to sign and she signed it, supposing it to be a receipt for $200.

The testimony of Henry W. Fuller, General Passenger Agent, is given in full as it appears in the record:

After the appointment of the receiver, November 27 or 28, 1887, I was the agent of the receiver of the C. & O. Rwy.

Mr. C. H. Chapin was in the service of the receiver as my direct representative in charge of the passenger business of the road. Mr. Frank Trigg, in November, 1886, was in the service of the Newport News and Mississippi Valley Company.

Cross-examination: During the month of November, 1887, I think this same advertisement (the advertisement in the Washington Post) was continued. I do not think that that advertisement was changed any. The place of business of the railroad company in this city was corner Sixth and Pennsylvania avenue. Mr. Chapin, when in his place of business, was in that office. My recollection is that the sign over the door was never changed. It was the Chesapeake and Ohio.

Redirect: Before I was in the employ of the Newport News and Mississippi Valley I was in the employ of the C. & O.; am familiar with the tickets from Louisville to Washington. All the tickets were issued under my general direction. (Witness is handed a railroad ticket to refresh his recollection.) This is a ticket from Washington to Louisville. It is not a ticket from Washington to Louisville and return. The form number indicates. It is a one-way ticket.

Recross: I did not do the detail work of issuing the ticket. The forms of all the tickets are passed on by me. I do not handle the detail of writing up the form. I could not say that I had seen or read a return ticket from Washington to Louisville issued about November, 1886, but I can say that we issued round-trip tickets of a certain form. I think I can state from memory the substance of the contents of these tickets at that time. My memory relies on the general system on which my tickets are formed. Each particular ticket has a particular form and number. This ticket has a form and number and an individual number, as you will find at the head of the ticket on each coupon. 758*c* is the form-number of this ticket. There would not be a return ticket of the form 758*c*; it would have an ex. (excursion) showing. In our system we issue a form of ticket, say, from Washington to Louisville, and that will be a 10*c*, for instance. We will issue another form of round-trip ticket over the same route, and it will be the same form, except that it will have the prefix ex., so that we have two forms—one straight and one round trip. The round trip would differ from the other only in having the reverse coupon and ex. I am able to

testify to that from our general course of business. I read the tickets when they are prepared, but I could not locate them of any particular day or month. (Thereupon witness was permitted to refresh his recollection from the ticket offered, and was then asked to testify as to what the return ticket would contain. To the asking of this question counsel for the plaintiffs objected, on the ground that the same called for incompetent matter; but the trial justice overruled the said objection and permitted the said witness to answer the same;—which ruling the counsel for the plaintiffs then and there excepted, and the trial justice entered the same upon his minutes. The return coupons of the ticket issues at that time corresponding to this would read: Louisville to Lexington by the L. & N.; Lexington to Huntington by the Elizabethtown, Lexington and Big Sandy; Huntington to Charlottesville by the Chesapeake and Ohio or Newport News and Mississippi Valley, as the case may have been; Charlottesville to Washington by Virginia Midland.

Q. Will you read the contract at the head of the ticket and tell me whether any language corresponding to that, and, if so, what language was on the return ticket? (Same objection and exception noted.) A. The return coupon of the contract would differ in some respects. It contains the main features, but contains a special round-trip contract. It would say that it was only good for return if presented in a certain number of days, but it would contain the same general features, the same language as at the head of this ticket. (Same objection and exception noted.) All the forms of tickets would contain that contract. The round-trip ticket would have a slight difference that the ticket would have to be used in a certain number of days. It reads: Washington to Louisville, Ky., via N. M. C. & O., E. L. & B. S., L. & N. The form is 758*c*. The return ticket would have the letters prefixed of e x, meaning excursion, form 758*c*. The next is C. & O. Rwy., good for one continuous first-class passage. Washington to Louisville, as per coupons attached. The other would read that way, subject to the following conditions, and the contract is as follows: "In selling this ticket for passage over other roads this company acts only as agent and assumes no responsibility beyond its own line. . . . None of the companies represented on this ticket will assume any liability on baggage except for wearing apparel, and then only for a sum

not exceeding $100. No stop-off check will be issued on this ticket. Signed H. W. Fuller, general passenger and ticket agent." The next is a coupon as follows: Issued by C. O Rwy. on account of L. & N. Railroad. One first-class passage, Lexington to Louisville. The check is not good if detached. Washington to Louisville, Ky., via. V. M., C. & O., E., L. & B. S., L. & N. The next coupon is as follows: Issued by C. & O. Rwy. on account of E., L. & B. S. RR., one first-class passage, Huntington to Lexington: this check is not good if detached. Washington to Louisville, Ky., via V. M., C. & O., E., L. & B. S., L. & N. The next coupon reads: C. & O. Rwy.; one first-class passage, Charlottesville to Huntington; this check is not good if detached. Washington to Louisville, Ky., via N. V. M., C. & O., E., L. & B. S., L. & N.; on margin, 857c; that appears on all coupons. The next coupon is as follows: "Issued by C. & O. Rwy. on account of Virginia Midland railway one first-class passage Washington to Charlottesville; this ticket is not good if detached. Washington to Louisville, Ky., V. M., C. & O., E., L. & B. S. & L. In every case where it is issued on account of another railroad the same words would appear on the return coupon.

Counsel for plaintiffs thereupon moved to strike out all the testimony of the witness in respect of the contents of the ticket in evidence as being incompetent; but the said motion was overruled by the court; to which ruling the counsel for the plaintiffs then and there excepted, and the trial justice entered the same upon his minutes; and the said witness further testified as follows: Did not post the announcement of the appointment of the receiver in the office; they were simply sent to our agents, and I don't know whether they were posted or not.

Recross: (Witness is shown combined maps and circulars marked Exhibit 18, A. I. T. T., to deposition of Mr. Wickham.) Whatever there is of good, bad, or indifferent in that I am responsible for as general passenger agent of the railroad. I ceased to be employed by the Chesapeake and Ohio road immediately on the formation of the Newport News and Mississippi Valley Company, in July, 1886. That company was organized under a Connecticut corporation. It is rather out of my knowledge. I did not hold any of the stock and never saw any of it. The Newport News and Mississippi Valley Company acquired its equipment by

purchase from the various companies composing it—the C. & O., the Elizabethtown, Lexington and Big Sandy, the C. & O. and Southwestern. Upon the dissolution of the Newport News and Mississippi Valley the rolling stock was turned back to the original companies that contributed it.

Q. I show you this circular which you say you are responsible for; on that page, under date November 21, 1886, you will see C. & O. Rwy. Co. running solid through trains between Washington and Louisville. A. That should have been C. & O. route. The solid trains running between Washington and Louisville was correct. We ran one train a day at that time between Washington and Louisville composed of a baggage car, two coaches, and a Pullman sleeper, and also one from Louisville to Washington. Just before the road went into the hands of the receiver I was in the employ of the Newport News and Mississippi Valley Company. Mr. Chapin was in the employ of the same company, and before that in the employ of the C. & O. Co. Mr. Chapin was then also employed by the C. & O. I commenced my employment with the C. & O. Co. fourteen years ago, in 1882 or 1883. Some three or four years after that they opened an office in Washington. Mr. C. P. Huntington was president at that time. We located our office here at 513 Pennsylvania avenue, and have never moved from there, the corner of 6th and Pennsylvania avenue. They put the name C. & O. Rwy. ticket office on the windows and over the doors. No changes have been made in the signs except colors and style; we try to improve them occasionally. As to the other advertisements (the newspapers), at the time we were operated by the Newport News and Mississippi Valley Company, for reasons I explained, purely advertising reasons, we always continued to use C. & O. Rwy. —C. & O. route. Could not say that from the time I commenced, in 1882, I ever advertised that I was the general passenger agent of the Newport News and Mississippi Valley Company; never took down the sign C. & O. railway passenger office; don't think the sign was ever changed. Mr. Chapin had been in my service for several years before 1887. As to the ticket about which I testified, from the course of business the return form would have these coupons on it, and each coupon would have at its head issued by the C. & O. Rwy. on account of the particular road that appeared on the different coupons. I say that it would be issued under the name of the

C. & O., because they were some old forms we had on hand and wanted to use them up. We were running one through train at that time under certain traffic arrangements with certain lines on which we operated. We ran between here and Charlottesville over the Virginia Midland Railway, thence over C. & O., or Newport News and Mississippi Valley, Eastern division, to Lexington, and thence to Louisville, on L. & N. At the time I first became its employee the C. & O. ran from Richmond to Huntington. To-day it runs from Newport News to Norfolk, by ferry connection to Lexington, Ky., by wheelage contract to Washington. Just before I ceased to be employed by the C. & O. Rwy. Co. and went into the employ of the Newport News and Mississippi Valley Company we had this run from Huntington to Lexington. Our line at that time extended from Lexington to Newport News and Old Point Comfort. We had been operating the Elizabethtown, Lexington and Big Sandy road; it was simply turned over to us to operate. After the change to the Newport News and Mississippi Valley, Mr. Huntington was president all the time and I continued as general passenger agent. The Virginia Midland hauled our train from Washington to Charlottesville under an arrangement by which they would receive in payment whatever proportion of the business might be coming to them, and the same train was hauled from Charlottesville to Lexington under a similar agreement and from Lexington to Louisville under a contract with the Louisville and Nashville road. We had no contracts for running cars to St. Louis, San Francisco or elsewhere. I don't think there was a contract in existence at that time between the C. & O. and the Virginia Midland, except an understanding that during the summer months certain cars would be called from the White Sulphur and through to Louisville. (Advertisement in Washington Post is read to witness). At the time of these advertisements we were only sending out one train from the Baltimore and Potomac Station. We had the authority of an arrangement with the Virginia Midland Company. I could not give it in detail. It was a special arrangement between us and the Virginia Midland. We paid no consideration for it. They took their proportion of the ticket business. They did local business on it all the way to Charlottesville. There was not a C. & O. employee on the train. From Charlottesville to Lexington

it was hauled over our own railway; that is a different sort of thing. We called it at times the C. & O.; at other times it was the Newport News and Mississippi Valley Company. The Virginia Midland got its proportion of the through-ticket price and we got ours. Our cars went from Lexington to Louisville under an arrangement with the Louisville and Nashville to take through cars. We had contracts with other roads than the Virginia Midland and the Louisville and Nashville. We have a contract with the Pennsylvania railroad to take our trains solid to New York city, and we go into their station in New York by an arrangement and contract with them. It is their train from Washington; we simply turn it over to them and they take what is in it. We have these contracts only with companies over whose roads we send through trains.

When the receiver was appointed for the C. & O. Rwy. Co. the Newport News and Mississippi Valley Company at once turned over to said receiver the road-bed and all the rolling stock and equipment of the said C. & O. Rwy. Co. The said receiver was ultimately discharged and the said railroad company was again operated by its own officers.

Witness identified the following advertisement as being authorized by him, and the defendant's counsel offered it in evidence. Counsel for plaintiffs objected to its admission, but the court overruled the objection; to which ruling counsel for plaintiffs excepted, and the presiding judge then and there noted the said exception on his minutes: Washington Post, November 23rd, 1886. C. & O. route. (Newport News and Mississippi Valley Company); Union depot, 6th and B streets; 11 a. m., for Newport News, Old Point Comfort, and Norfolk, 7 p. m.; 9 a. m. for all stations on the C. & O. and points west; Sleeper from Clifton Forge daily except Sunday; 5.30 p. m., fast Western express, daily; Solid train, with Pullman sleeper to Louisville; Pullman service to Cincinnati and St. Louis, Memphis and New Orleans; Apply at C. & O. Rwy. office, 513 Pennsylvania avenue, and B. & P. stations. H. W. Fuller, general passenger agent; Frank Trigg, General N. E. Pass. Agt.

The history of the several corporations engaged from time to time, in operating the "C. & O. route" is given in the testimony of Henry T. Wickham, Esq., a witness for the defendant, as follows:

"Am a lawyer and director and general solicitor of the

C. & O. Rwy. Co.; entered the service of the company in 1874; in January, 1886, was appointed general solicitor and was made a director in 1888. The line of road constructed under the charter of C. & O. Rwy. Co. extends from Fortress Monroe, Virginia, to the west bank of the Big Sandy river. Soldier is a station on the line of the Elizabethtown, Lexington and Big Sandy Railroad Company in Carter County, Kentucky, about 58 or 60 miles west of the Big Sandy river. The Elizabethtown, Lexington and Big Sandy Railroad Company is a corporation chartered under the laws of the State of Kentucky.

Am entirely familiar with the history of that road. The charter was amended in 1870 so as to give the company power to make contracts with other roads and to lease its line. It was further amended in 1871 to authorize the company to have a terminal in Louisville, and in 1872 an act was passed by the Kentucky legislature authorizing the Elizabethtown, Lexingtown and Big Sandy Railroad Company and the C. & O. Rwy. Co. to bridge the Big Sandy river. (Copies of these acts placed in evidence.) Under these acts the line of the Elizabethtown, Lexington and Big Sandy Railroad Company was constructed from Lexington, Kentucky, to the west bank of the Big Sandy river, terminal facilities in Louisville, Kentucky, being provided by contract between the Elizabethtown, Lexington and Big Sandy Railroad Company, the Louisville and Nashville Railroad Company, and the C. & O. and South Western Railroad Company, dated December 28, 1881. (Copy of which contract is placed in evidence.) On November 12, 1879, an agreement was made between the C. & O. Rwy. Co. and the Elizabethtown, Lexington and Big Sandy Railroad Company, the substance of which was that the C. & O. Rwy. Co., whose line then terminated at Huntington, West Virginia, should extend its line eight or nine miles from Huntington to the west bank of the Big Sandy river, building a bridge across the Big Sandy river, and that the Elizabethtown, Lexington and Big Sandy Railroad Company, whose line then terminated at Mt. Sterling, in Montgomery County, Kentucky, should build and complete the line from Mt. Sterling to the Big Sandy river to a connection or point of junction with the C. & O. Rwy. It was also agreed that the Elizabethtown, Lexington and Big Sandy River Railroad should be allowed the free use of the eight

miles of road, including the bridge into the depot of the C. & O. Rwy. Co., with terminal facilities at Huntington, for a term of five years from the date of the completion of the road between Huntington and Big Sandy river. The road was completed between Huntington and the Big Sandy river early in 1882, according to my recollection. Am familiar with the history of the Mississippi Valley Company. Collis P. Huntington, a native of the State of Connecticut, was largely interested and the controlling spirit in a number of railroads, both west and east of the Mississippi. He had a plan for bringing into practically one management a line of road extending from the Atlantic to the Pacific. He consolidated his lines west of the Mississippi under the name of the Southern Pacific Company. In the progress of this plan he got a charter from the State of Connecticut under the name of the Southern Pacific Company, which name as regards the lines east of the Mississippi river was subsequently changed by the Connecticut legislature to the Newport News and Mississippi Valley Company. (Copy of which charter is by consent made part of the deposition.) He organized his lines east of the Mississippi river, consisting of the C. & O. Rwy. Co., the Elizabethtown, Lexington and Big Sandy Railroad Company, and the C. & O. and Southwestern Railroad Company. The dates of the various acts constituting the charter of the Newport News and Mississippi Valley Company are March 27, 1884, incorporating the Southern Pacific Company; March 10, 1885, changing the name of the Newport News and Mississippi Valley Company, and an amendatory—approved April 27, 1887. The Newport News and Mississippi Valley Company had organized and taken a number of leases from the foregoing companies, when a question arose as to the provisions of the original act, approved March 27, 1884, which provided that the Newport News and Mississippi Valley Company should not have the power to make joint stock with, own, hold, or operate any railroad in the State of Connecticut. The amendment of April 27, 1887, added these words: "Unless such railroad shall be held, owned, or operated within said State in conformity with the provisions of the general law of the States." I was the general solicitor of the Newport News and Mississippi Valley Company.

(Witness hands the examiner copies of leases from the Elizabethtown, Lexington and Big Sandy Railroad Com-

pany and the C. & O. Co. to the Newport News and Mississippi Valley Company which by consent are made part of his deposition). (The lease from the Elizabethtown, Lexington and Big Sandy Railroad Company to the Newport News and Mississippi Valley Company is dated January 29th, 1886, and provides in substance that the lessor leases to the lessee for a period of 250 years from the 1st day of February, 1886, the railroad extending from Lexington, Kentucky, to the west side of the Big Sandy river, together with its rights and privileges issuing out of the contracts with the Ashland Coal and Iron Company and with the C. & O. Co. in respect of the railroad from the west bank of the Big Sandy river to Huntington, the lessee agreeing to pay $5,000 per annum rent. The lease from the C. & O. to the Newport News and Mississippi Valley Company provides that the C. & O. Co. leases to the Newport News and Mississippi Valley Company for a period of 250 years from July 1st, 1886, its railroads from Phœbus, Virginia, to Huntington W. Va., together with its rights and privileges arising out of its agreement with the Elizabethtown, Lexington and Big Sandy Railroad Company in respect of the railroad between Huntington and the west side of the Big Sandy river, for an annual rental of $5,000. It is signed by C. & O. Rwy. Co., C. P. Huntington, President; and Newport News and Mississippi Valley Company, C. P. Huntington, president.

And thereupon the witness further testified as follows: The C. & O. Rwy. Co. got into financial difficulties and was put into the hands of a receiver by the decrees of the Circuit Court of the County of Henrico and the Circuit Court of the County of Kanawha, on the 27th and 28th days of October, 1887, respectively, but from the date of the lease to the date of the decrees aforesaid, when the property was placed in the hands of a receiver by the court, the Newport News and Mississippi Valley Company operated the C. & O. Co., but after the appointment of a receiver the Newport News and Mississippi Valley Company had nothing whatever to do with the C. & O. Rwy. Co., but continued to operate the Elizabethtown, Lexington and Big Sandy Railroad Company under the lease. My connection with the Newport News and Mississippi Valley Company terminated with the appointment of the receiver. I then became general solicitor for the receiver. The Newport News and

Mississippi Valley Company continued to operate the Elizabethtown, Lexington and Big Sandy Company until 1892, I think. (The various charters, acts and conveyances showing the limits of the C. & O. Rwy. Co. are by consent placed in evidence.) The C. & O. Co. had nothing to do with the operation of the Elizabethtown, Lexington and Big Sandy Railway, while the Newport News and Mississippi Valley Company was operating it.

Cross-examination: Mr. Huntington controlled a number of disconnected roads both east and west of the Mississippi, which he desired to bring under one management, that of himself. He organized the lines west of the Mississippi under the charter of the Southern Pacific Company; those east of the Mississippi under the charter of the Newport News and Mississippi Valley Company. Mr. Huntington at the date of the leases was the president of the C. & O. Rwy. Co. and the president of the Newport News and Mississippi Valley Company. Mr. Reid was president of the Elizabethtown, Lexington and Big Sandy Company, but Mr. Huntington controlled both these roads in that he owned a very large portion of the stock and controlled most of that which he did not own. In one sense it was all under his control, but not in the sense of their being the same legal entities. Thereupon the witness was shown a map and circular.

(This is in one of the forms of the ordinary "railway folder," and bears date November 21, 1886. On one side is a map of the United States showing railway lines and connections, and is entitled "Map of C. & O. Route." A broad and heavily shaded line, designated as "C. & O. Rwy." extends from Louisville, Kentucky, to Newport News and to Washington. On the reverse side, as folded, appear pictures and reading matter descriptive of the route and connections with accompanying time tables between Washington and Louisville and Cincinnati. Among the inscriptions thereon in large type appear: Time Table C. & O. Newport News and Mississippi Valley Co., W. C. Wickham, Second Vice President. H. W. Fuller, General Passenger Agent. Richmond, Virginia. C. & O. Route. Only line running solid trains between Washington and Louisville. The solid train for Louisville and Cincinnati.)

Whereupon witness answered: This map and time table was given to the public by the authority of H. W. Fuller, general passenger agent of the Newport News and Mississippi

Valley Company, approved by John Muir, general traffic manager, and W. C. Wickham, 2d vice president; they had charge of the running of the road. It is dated November 21, 1886. I presume it was substantially what was in effect before that time, with the exception of changes in times of trains, connections, etc. The company gave out that publication because the trade-mark, as it were, of the system was the "C. & O. route." It was a well-known line and was being pushed and advertised for all it was worth. Through trains were run upon this route prior to the lease under an arrangement by which it was practically a continuous system. After the contract of November 12, 1879, between the C. & O. Rwy. Co. and the Elizabethtown, Lexington and Big Sandy Railroad Company, the former built the eight miles of road, including the bridge across the Big Sandy river, from Huntington to the west bank of the Big Sandy river, the latter completing its line to a junction or point of connection at the west bank of the Big Sandy, as I have said before, in the early part of 1882. The properties were then operated together by one general manager, Mr. C. W. Smith, under the verbal directions of Mr. C. P. Huntington, I have always understood, who was president of the C. & O. Co. and controlled a majority of the stock of the Elizabethtown, Lexington and Big Sandy Railroad Company. Under the arrangement the officers of the C. & O. Co. operated and maintained a line of railroad for and on account of the Elizabethtown, Lexington and Big Sandy Railroad Company from the west bank of the Big Sandy river to Lexington, and included in that also the eight miles of track between the west bank of the Big Sandy river and Huntington. They operated it, as I have said, for and on account of the Elizabethtown, Lexington and Big Sandy Railroad Company, keeping an account on the books of the C. & O. Rwy. Co. of all receipts of every character between Huntington and Lexington, including also the Louisville connection, and charged to the Elizabethtown, Lexington and Big Sandy Railway Company all disbursements in that part of the line. The arrangement continued in effect until the organization of the Newport News and Mississippi Valley Company, when its operating officers, who were General Wickham and Mr. Fuller, operated the properties under the leases. The duration of this contract was five years from the date of the completion of the road, which was in the early part of 1882, which would have

made the duration until 1887. The organization of the Newport News and Mississippi Valley Company terminated the contract, I suppose, by force of the arrangement then made. It was terminated in the same manner it was made, by direction of Mr. Huntington. Mr. Huntington directed Mr. Smith to operate the properties, as I have indicated, and upon the formation of the Newport News and Mississippi Valley Company and the execution of the leases he directed the operation of the line to be had in accordance with these leases. Mr. Huntington undoubtedly controlled the whole enterprise in that he held a controlling interest in each company. He was president of the C. & O. Rwy. Co., the president of the Newport News and Mississippi Valley Company, and Mr. Reid, who was president of the Elizabethtown, Lexington and Big Sandy Company, acted always in Mr. Huntington's interest. The leases were prepared under the direction of Mr. Huntington and expressed, as far as they went, his desires toward the completion of the plan he entertained. This accident happened, I believe, on November 16 or morning of November 17, 1886. When the leases went into effect it might be possible that there was on hand an old stock of C. & O. tickets, but my impression is that this issue of tickets must have been exhausted by the time of the accident and been substituted by Newport News and Mississippi Valley Company tickets. At the time of the accident tickets were issued in the name of the Newport News and Mississippi Valley Company, as far as I know. Prior to the organization of the Newport News and Mississippi Valley Company the tickets were issued in the name of the C. & O. route, I think; am not sure whether they specified C. & O. Rwy. Co. or the C. & O. route. The line was operated as I have said. It was known to the public as the C. & O. route or road. If any of the C. & O. tickets were outstanding at the time of the new arrangement, I am inclined to think that the Newport News and Mississippi Valley Company would have had the right to refuse to honor such tickets. If the company did honor such a ticket, then the possessor of the ticket got ahead of the Newport News and Mississippi Valley Company by that much unless an agent of the Newport News and Mississippi Valley Company had sold it. If the passenger was rightfully on the train, the Newport News and Mississippi Valley Company undoubtedly would have been liable for a breach of its duty as a common carrier if

any accident happened by the negligence of that company. Mrs. Howard's case was referred to me. I was general solicitor of the Newport News and Mississippi Valley Company at that time. Mr. Charles H. Tweed was at that time general counsel of the Newport News and Mississippi Valley Company in New York. He was also Mr. Huntington's lawyer.

(Witness is shown the following letter): C. & O. Rwy. Co., Mills Building, seventh floor, room 1, Chas. H. Tweed, counsel, New York, March 7, 1887. W. L. Armstrong, 71 Broadway. Dear Sir: Referring to your letter of 25th ult. to Mr. Huntington in regard to claim of Mrs. L. P. Howard, which you inform me has been placed in the hands of Mr. J. H. Judge, I should be very much obliged if you would ask Mr. Judge if he would have any objection to Dr. Meredith Clymer visiting Mrs. Howard, and, if he has no objection thereto, whether he will send me such a note as will secure Dr. Clymer an opportunity of seeing her. Yours very truly, Chas. H. Tweed. I recognize the signature of Mr. Tweed. (Letter read in evidence.) I do not think the C. & O. Company made any offer of settlement with Mrs. Howard. I remember very distinctly that as general solicitor of the Newport News & Mississippi Valley Company I directed the chief surgeon of that company, Dr. Brock, to see her in Washington. He did see her and paid her $200.00 settlement of her claim, which I vouched. Soldier, where this accident occurred, is in the State of Kentucky and a station on the line of the Elizabethtown, Lexington and Big Sandy Railroad about fifty miles west of the Big Sandy river. It is between Huntington and Lexington.

II.

Jurisdiction of the Court over the Defendant.

A number of instructions were asked by the plaintiffs, all of which were refused. Without giving these it is sufficient to say that they covered the points, in application to the evidence, upon which the plaintiffs relied. The court then ordered the jury to return a verdict for defendant.

1. The judgment appealed from cannot be sustained upon the ground that the court below had no jurisdiction over the defendant, because it was a foreign corporation. The

marshal's return of service upon C. H. Chapin, agent of the defendant in the District of Columbia, follows the statute providing for the service of process upon foreign corporations (R. S. D. C., Sec. 790), and makes a *prima facie* case of "doing business in the District" as well as of the agency of the party so served. The defendant's pleas raised the only points in respect of the jurisdiction of the court that could operate in a case like this, namely, that the court had not acquired jurisdiction of the foreign corporation because it was not doing business in the District of Columbia at the time of the service of the writ; and the party served as its agent therein was not such an agent as to give jurisdiction through that service. Having jurisdiction of the subject matter of the suit, the court could unquestionably render a binding judgment against the defendant, though a foreign corporation, upon service had in compliance with the provisions of the statute and founded on the existence of the conditions therein prescribed, or upon its general appearance, by competent authority, to defend the action. Goldey *vs.* Morning News, 156 U. S. 518.

Section 790, *supra*, was intended merely to remedy an existing mischief by providing a simple and effectual way through which a foreign corporation doing business in the District of Columbia might be brought "before the court" and compelled to answer. It does not undertake to limit the general jurisdiction of the courts of the District, and cannot be construed as preventing their jurisdiction from attaching in any case where a foreign corporation might, like a natural person resident elsewhere, appear by competent authority and answer the cause of action.

The remarks made in Ambler *vs.* Archer, 1 App. D. C. 94, 106; 21 W. L. R. 600, in respect of the jurisdiction of causes of action against foreign corporations must be taken in application to the facts of that case. As stated in the opinion, that case "involved the question of the liability of a foreign corporation to be sued and called to account in the courts of this District for and in respect of all their corporate transactions occurring in other jurisdictions." Id., p. 99. It has been generally held, and for reasons that are obvious, that no court will take jurisdiction to exercise visitatorial power over a foreign corporation, or to regulate its internal affairs. Clark on Corp. 639; Taylor Corp. Sec. 392.

The defendant had the right to appear specially, as it did in the first instance, and controvert the jurisdiction; and none of its rights were thereby waived. Goldey *vs.* Morning News, 156 U. S. 518, 525. Consequently, when its pleas were stricken out and judgment by default rendered, it could have appealed and tested the soundness of that ruling. But instead of adopting that course, it moved the court to set aside the default, and that motion was granted upon condition that it should plead the general issue. The acceptance of the condition involved an abandonment of the pleas attacking the jurisdiction and the validity of the service of the writ, and had the court erred in striking them out, the defendant would be estopped to question the soundness of the ruling. Railroad Co. *vs.* Brown, 17 Wall. 445, 450.

Moreover, conceding the view of the operation of the statue aforesaid contended for by appellee, the jurisdiction of the court was, nevertheless, complete. Defendant had for years maintained an office in the District, where, represented by a resident agent, it was engaged in business. Disregarding the lease made by the defendant to the Newport News and Mississippi Valley Company, which will be discussed later, that office and agency remained unchanged at the time of the appointment of the receiver by the courts of Virginia and West Virginia. The decrees of those courts could not operate a transfer of the property of the defendant in the District of Columbia, and the receiver appointed by them had no authority that must be respected here. Booth *vs.* Clark, 17 How. 322; see also Brigham *vs.* Ludington, 12 Blatch. 237, 242; Day *vs.* Postal Tel. Co., 66 Md. 354, 360; T. & P. RR. Co. *vs* Gay, 86 Tex. 571, 597; Filkins *vs.* Nunnemacher, 81 Wis. 91; Farmers' and Merchants' Ins. Co. *vs.* Needles, 52 Mo. 17.

What has been said above must be confined to the point actually ruled, which is that the decree of the Virginia court had no effect as such within the District of Columbia, and could not itself operate a transfer of the property of the defendant situated therein. There may probably be cases in which the courts of the District would, upon application and for good cause, recognize the receiver appointed by the court of a State and permit him to become a party to litigation affecting the estate or fund or interests that might be under his management;

but that question will not now be decided. Notwithstanding, then, the appointment of the receiver, the defendant remained in existence as a corporation, not only here, but in the State of its creation also; and although it may have admitted the Virginia receiver into the occupation of its office in the District, it does not follow necessarily that it abandoned its property, ceased its corporate business entirely, discharged its former agent and left the District. The mere employment of the defendant's general agent by the receiver did not of itself operate his discharge from its representation. There is nothing irreconcilable in his service of both the defendant and the receiver; and there was nothing to prevent them from co-operating, if they saw proper, in the management of the business. Railroad Co. *vs.* Brown, 17 Wall. 445, 450; P. R. Co. *vs.* Jones, 155 U. S. 333, 350.

III.

Plea of Limitations to Amended Declaration.

2. In respect of the plea of limitation, we are of the opinion that the amended declaration, though filed more than three years after the accrual of the cause of action, did not open the case to that bar. The possession of a valid ticket over the defendant's lines of railway entitled Laura P. Howard, as holder thereof, no matter from whom purchased, to all the rights of a passenger and charged the defendant with all the ordinary duties of a common carrier. Sleeper *vs.* Pa. RR. Co., 100 Pa. St. 259. For the breach of the contract, or the failure of the duty assumed thereunder, the plaintiff could declare in the form of *assumpsit* or in tort. We do not think it necessary to follow counsel in their critical examination of the precise nature of the form of the action as disclosed by the terms of the original and amended declaration, both of which are fairly set out in the statement of the case. It is sufficient to say that the original is in *assumpsit*, and that the amendment seems not to depart substantially from it. The rule in respect of amendments that prevails in our practice is both liberal and just. Magruder *vs.* Belt, 7 App. D. C. 303, 312: 23 W. L. R. 827; Morris *vs.* Wheat, 25 W. L. R. 494. And when an amendment shall have been made, the question whether the action has been thereby opened to the bar of limitations depends upon

matter of substance. Morris *vs.* Wheat, *supra.* Whether the cause of action remains the same should be the test, and the mere change from the form of action in *assumpsit* to one in tort would be immaterial. Smith *vs.* Bellows, 77 Pa. St. 441. (*See especially the case in this court of Chapman* v. *Barney, 129 U. S. 677*, in which a change from *assumpsit* to *trover* was approved.)

IV.

Validity of Release Executed by the Plaintiff Laura P. Howard.

3. Another contention in support of the judgment is that the release under seal executed by Laura P. Howard to the Newport News and Mississippi Valley Company was a complete bar to the action, and of itself required an instruction to the jury to find for the defendant. The ground is that under the statute defining the separate property of married women and their right of contracting and suing in respect thereof without joining the husband (R. S. D. C., Sec. 727), the right of action in this case became the separate property of the wife, and could be discharged by her separate act. No instruction was asked by either party in respect of this point, and it seems to have been completely ignored. It may be here remarked, that even in the view of the wife's right contended for by the defendant, the husband had an independent right to recover such special damages as he may have sustained by reason of the injury to his wife. Met. R. Co. *vs.* Snashall, 3 App. D. C. 435; 22 Wash. Law Rep. 381. It is not necessary to consider whether this right of property in a cause of action for personal injury accruing in another State must be determined by the law of the forum, of the domicile of the injured party, or of the place of the contract and injury. There being no proof of the laws of Kentucky or Indiana as regards the property rights of married women, the presumption must be indulged either that the rule of the common law or that in force in the District of Columbia prevails in both those States. If it be the rule of the common law, clearly the wife could not release the claim for damages. If it be the rule prevailing in the District, we are constrained to adopt the same conclusion. It seems to have been the general opinion of the profession that the statute did not

embrace a right of action for personal injuries, and hence it was the universal rule, so far as we can now learn, to bring such suits, after the date of the act as before, in the names of both husband and wife. The question at last came before the Supreme Court of the District, in General Term, in 1890, and after full consideration it was held that such a right of action was not the separate statutory property of the wife. Snashall *vs.* Met. RR. Co., 19 D. C. 407, 411. The soundness of that decision seems not to have been questioned until the argument of this case. It has become a rule of property to as great an extent as is possible in respect of property of such peculiar character, and whilst not altogether satisfied with the reasoning by which the conclusion was reached, we think it proper to follow it in a case coming directly within it. What the rights of the wife might be under certain circumstances, as against the husband, will not now be inquired of; but may be regarded as open for consideration when a proper case may be presented. Nor is it material to inquire whether, under the allegations of the declaration, the husband is not estopped to deny that the claim in suit is the separate property of the wife through his gift of the same to her; for if the right was not her separate property under the statute, she could not make a contract effective, at least, at law, without his joining with her. Rathbone *vs.* Hamilton, 4 App. D. C. 475, 485, 488; 22 Wash. Law Rep. 766.

V.

Was there Sufficient Evidence to go to the Jury on the Question as to Whether the Defendant was Responsible for the Accident in Question.

4. The decision of these preliminary questions against the contention of the appellee brings us to the consideration of the points upon which the case was actually made to turn by the learned justice who presided at the trial and directed the verdict.

(1) We are of the opinion that the evidence of H. W. Fuller respecting the contents of the ticket was rightly admitted. It is true that the absence of the ticket itself was not directly accounted for, but no objection was made on that ground. The witness was general passenger agent at the time the ticket was printed, and, whilst he had not

seen that particular ticket, he was able to testify to its contents from his recollection of the forms of tickets then in use, all of which had been prepared under his direction. The person who sold the unused part of the ticket to Mrs. Howard produced a memorandum entry of the sale showing that the ticket was of a printed form designated as 758c. The witness Fuller produced a single trip ticket from Washington to Louisville, of that form, and then testified that the "round trip" tickets had the same designation, but with the additional term "ex.," signifying excursion or round trip, and that their conditions were identical in all respects save one relating exclusively to the use of the return coupon. That condition has no bearing whatever upon the case. In this state of the evidence it was not improper to permit the witness to refer to the single trip ticket in order to refresh his memory of the precise words printed on the excursion ticket which, with its return coupon only, Mrs. Howard had purchased and used.

(2) The ticket upon its face declared that the defendant, in selling it, assumed no responsibility beyond its own line, and acted as agent only for connecting lines. In the absence of a special contract to the contrary, the selling carrier's duty is completely discharged by safe carriage to the end of its own line where a connecting carrier may be ready to continue the transportation on the designated route. P. R. Co. *vs.* Jones, 155 U. S. 333, 339. And in so far as the duty of the defendant is to be controlled by the terms of the contract in this case, it remains unchanged. The original purchaser was bound by these conditions, and plaintiff, holding under him, could have no better right. Therefore, if the testimony shows that the defendant and the corporation which owned the line between Lexington and Big Sandy were engaged in the operation of their own lines respectively, without partnership or agreement for joint operation beyond that of receiving and forwarding passengers upon such tickets, with separate coupons for each line, the defendant incurred no liability to the plaintiff, and the instruction to the jury would have to be sustained. P. R. Co. *vs.* Jones, 155 U. S. 333.

(3) From that testimony, given exclusively by defendant's witnesses and set out in full in the preliminary statement, it appears that the road upon which the accident occurred had been built by the Elizabethtown, Lexington and Big

Sandy Railway Company under a charter from the State of Kentucky, and is wholly within that State. That charter authorized it to make contracts with other corporations for the operations of its railway. The C. & O. Rwy. Co., under charter from the State of Virginia, built and operated a railway from Newport News to Huntington and Big Sandy, connecting with the line of the Elizabethtown, Lexington and Big Sandy Railway Company. Collis P. Huntington, the principal stockholder and the controlling spirit of each corporation, conceived a plan to bring under one management the foregoing railway lines and others into one great line of transportation from the Atlantic to the Pacific. Beginning in 1882, trains were run over the two lines aforesaid, by the name of the C. & O. route, "under an arrangement by which it was practically a continuous system." "The properties were then operated together by one general manager, Mr. C. W. Smith, under the verbal directions of Mr. C. P. Huntington." The terms of this "arrangement" are not given; but it appears that the defendant's officers maintained the railway of the Kentucky corporation and kept an account of all receipts and disbursements on account of the latter. From the terms of the "arrangement" as stated, and the nature of the proceedings thereunder, we think it clear that the defendant became responsible for the safe carriage of passengers over the railway of the Kentucky corporation. P. RR. Co. *vs.* Jones, 155 U. S. 333; Sun Ins. Co. *vs.* Kountz Line, 122 U. S. 583. The condition of a contract, therefore, confining defendant's liability to its own line, must necessarily be limited in its operation to such other connecting lines only as may have remained under their own separate and independent management. This "arrangement" or contract for the operation of one line by the other was to extend to the latter part of the year 1887, or about one year later than the date of the injury to Mrs. Howard. It follows, therefore, that if nothing had occurred in the meantime to change the arrangement aforesaid, the condition of the ticket would not prevent recovery in this action if the injuries received by Mrs. Howard were caused by the carrier's negligence.

(4) The chief point of defendant's contention is that the arrangement had come to an end prior to the accident, in so far as defendant was concerned, by the lease

of its line to the Newport News and Mississippi Valley Company. The evidence in support of this contention shows that in January and June, 1886, respectively, the defendant and the Elizabethtown, Lexington and Big Sandy Railway Company had entered into contracts with the Newport News and Mississippi Valley Company for the lease of their lines for 250 years, upon an annual rental of $5,000. Collis P. Huntington signed the defendant's lease for each company as president. Though not president of the Kentucky corporation, he controlled it absolutely. This was all done in execution of his plan for a great Atlantic and Pacific railway system. Referring to the arrangement aforesaid, under which the defendant operated the two lines of railway, the witness said: "The organization of the Newport News and Mississippi Valley Company terminated the contract, I suppose, by force of the arrangement then made. It was terminated in the same manner it was made by direction of Mr. Huntington; Mr. Huntington directed Mr. Smith to operate the properties, as I have indicated, and upon the formation of the Newport News and Mississippi Valley Company and the execution of the leases, he directed the operation of the line to be had in accordance with these leases." This general lessee corporation was incorporated by the legislature of the State of Connecticut, March 27, 1884, under the name of the Southern Pacific Company, which was changed by an amendatory act, March 10, 1885, to that of the Newport News and Mississippi Valley Company. This act of incorporation is not set out in the record, and it does not appear what express powers it was authorized to exercise outside the limits of that State. One clause is given, however, which expressly forbids the power to "make joint stock with, own, hold or operate any railroad in the State of Connecticut."

Virtually banished from the State of its creation, this corporation came to the State of Virginia, and apparently without permission of the legislature of that State, leased and undertook to operate the railway and exercise the franchises of the defendant. It is unnecessary to cite authorities to the point that defendant a *quasi* public corporation of the State of Virginia, could not, without the express consent of that commonwealth, escape the performance of its duties and obligations by a voluntary surrender of its road to a so-called lesssee. Whilst the lessee might become liable for an injury

done in the operation of the railway, the lessor would not be exempt by reason of its retirement therefrom. Two things must concur to give full legal operation to a lease by one such corporation to another, namely, the permission of the State through power expressly conferred upon each. St. Louis, etc., R. Co., *vs.* T. H. & I. R. Co., 145 U. S. 393, 402. There is nothing in the record to show that the State of Virginia ever authorized the lease by defendant of its railway. Nor does it appear that the existence of the Newport News and Mississippi Valley Co. had ever been recognized by that State, or the State of Kentucky, much less the power conferred upon it to lease and operate a railway therein. If it had been proved that the defendant had the general power to lease its road that seems to have been conferred upon the Elizabethtown, Lexington and Big Sandy Rwy. Co., and that the Newport News and Mississippi Valley Co. had the general power under its charter to lease and operate railways anywhere outside of the limits of Connecticut, we could not regard this lease as exempting the defendant from liability. Notwithstanding the independent existence of our States, their mutual relations and interests and the general welfare of the Union demand that in respect of the recognition of legislative and judicial acts of one by the others, the widest and most liberal principles of comity should prevail. There is no proper room for the exercise of a selfish or a jealous spirit. But the limit is reached when one seeks to act in respect of matters peculiarly within the power of another, or in opposition to its fixed policy. Consequently, by operation of the spirit of comity, the *bona fide* corporations of one State have been permitted to enter the others, to maintain offices, to transact business and to maintain their rights in the courts where their business and objects have not been immoral, or opposed to sound and well-defined public policy. But comity has never been stretched so far by any State as to permit the corporation of another State to exercise an extraordinary power or franchise within its boundaries, without its own express grant. And for the same reason, the courts of a state will not recognize a contract by which a foreign corporation, without express sanction of their own legislature, takes upon itself the performance of duties and powers of a public nature which have been conferred upon corporations created by the State itself for those purposes. Moreover, there is a another well-

founded limitation upon the exercise of comity in all such cases. A foreign corporation should not be recognized or tolerated in the exercise of extraordinary powers or in carrying on business that are expressly forbidden it in the State of its creation. This general doctrine has been enounced in a well-considered case by the Supreme Court of Kansas that commands our approval. Land Grant Ry. & T. Co. *vs.* Board Coms. Coffey Co., 6 Kans. 245; see also 6 Thomp. Corp., Sec. 7896; 2 Morawetz Corp., Sec. 965*a*; Wharton, Confl. Laws, 390*b*. Though not fully stated in the record, the charter of the lessee company shows enough to bring it within the exception to the rule of comity above stated. Discredited by its own creating legislature, specially forbidden the exercise of these very powers in its own State, and practically expelled therefrom, are other States, in the language of the Supreme Court of Kansas, "bound by any kind of courtesy or comity or friendship, or kindness to treat this corporation better than its own creator has done?" We think not. Had this corporation been recognized in the exercise of these powers by the Court of Appeals of Virginia, we would feel bound to follow its decision and give effect to the lease within the limits of that State; but in the absence of such a decision we will give effect to our own opinion. That the probability of such a decision by the courts of the States directly interested was apprehended by the controller of these corporations, is apparent from the evidence of the witness heretofore freely quoted from, who had been the general solicitor in Virginia, for both the lessor and lessee. He says: "The Newport News and Mississippi Valley Company had organized and taken a number of leases from the foregoing companies when a question arose as to the provisions of the orginal act which provided that the Newport News and Mississippi Valley Company should not have the power 'to make joint stock with, own, hold or operate any railroad in the State of Connecticut.' The amendment of April 27, 1887, added these words: 'Unless such railroad shall be held, owned or operated within said State in conformity with the provisions of the general laws of the State.'" It is not necessary to consider the effect of this amendment, because it took effect long after the accrual of plaintiff's cause of action. The same apprehension, we may add, seems to have inspired the terms of the release obtained from Mrs. Howard, which discharged

not only the said lessee by name, but also its "lessors or predecessor companies."

5. Having occupied so much space with a statement of the evidence upon which the case was submitted in order that it might be fully and fairly presented, and having dwelt at some length upon the questions that required consideration and decision, we will pretermit, as unimportant as well as unnecessary, in view of the foregoing conclusions, the consideration of the general question of liability irrespective of the invalidity of the lease.

Being of the opinion, for the reasons above given, that it was error to direct a verdict for the defendant, the judgment will be reversed, with costs to the appellants, and the cause remanded with direction to set aside the verdict and grant a new trial. It is so ordered.

Reversed and remanded.

The opinion of the Court of Appeals upon the third trial of the cause, which is immediately involved here, is as follows:

WEDNESDAY, *January 18th, A. D.* 1899.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, Appellant, *vs.* WILLIAM HOWARD and LAURA P. HOWARD, His Wife. } No. 845.

The argument in the above-entitled cause was commenced by Mr. Leigh Robinson, attorney for the appellant, and was continued by Messrs. James Francis Smith and R. Ross Perry, attorneys for the appellees, and was concluded by Mr. Leigh Robinson, attorney for the appellant.

Opinion.

Mr. Justice SHEPARD delivered the opinion of the Court

I.

Statement of Case.

1. This action was begun by Laura P. Howard and husband in the Supreme Court of the District of Columbia on November 12, 1887, to recover damages for injuries received

by her, as alleged, whilst being carried as a passenger on defendant's railway. The injury occurred at a station called Soldier, in the State of Kentucky, on November 18, 1886.

The first trial below resulted in a judgment for the defendant, the jury having been charged to return a verdict because there was not sufficient evidence to show that the railway line on which the accident occurred was owned, managed or operated by the defendant.

On appeal by Mrs. Howard, that judgment was reversed and the cause remanded for a new trial. 11 App. D. C. 300.

The second trial resulted in a judgment for the plaintiffs, from which the defendant has appealed.

Two questions that were determined adversely to the defendant on the former appeal, namely, in respect of the jurisdiction, and of the plea of limitations to the amended declaration, will not be reconsidered.

Others will be, because it is claimed that by reason of the additional evidence introduced on the last trial they have been presented in a materially different light.

The evidence introduced on the first trial, all of which that is of importance was reintroduced on the second, is fully set out in the report of the case above referred to, and each additional and material fact that the record discloses will be referred to in the discussion of the point upon which it bears, in the course of this opinion.

II.

Was there Sufficient Evidence to Submit to the Jury on the Question of Defendant's Liability?

2 The first point to be considered by us is, whether there was sufficient evidence to justify the court in submitting to the jury the question, whether the defendant was engaged in the operation of the road of the Elizabethtown, Lexington and Big Sandy Railroad Company (called the Kentucky corporation) at the time of the accident.

This was one of the questions considered in the opinion on the former appeal, and it was then said:

"From the testimony, given exclusively by defendant's witnesses and set out in full in the preliminary statement, it appears that the road upon which the accident occurred had been built by the Elizabethtown, Lexington and Big Sandy Railroad Company under a charter from the State of

Kentucky, and is wholly within that State. That charter authorized it to make contracts with other corporations for the operation of its railway. The Chesapeake and Ohio Railway Company, under charter from the State of Virginia, built and operated a railway from Newport News to Huntington and Big Sandy, connecting with the line of the Elizabethtown, Lexington and Big Sandy Railway Company. Collis P. Huntington, who was the principal stockholder and the controlling spirit of each corporation, conceived a plan to bring under one management the foregoing railway lines and others into one great line of transportation from the Atlantic to the Pacific. Beginning in 1882 trains were run over the two lines aforesaid under the name of the Chesapeake and Ohio route, 'under an arrangement by which it was practically a continuous system.' 'The properties were then operated together by one general manager, Mr. C. W. Smith, under the verbal directions of Mr. C. P. Huntington.' The terms of this 'arrangement' are not given; but it appears that the defendant's officers maintained the railway of the Kentucky corporation and kept an account of all receipts and disbursements on account of the latter. From the terms of the 'arrangement' as stated, and the nature of the proceedings thereunder, we think it clear that the defendant became responsible for the safe carriage of passengers over the railway of the Kentucky corporation. P. RR. Co. *vs.* Jones, 155 U. S. 333; Sun Ins. Co., *vs.* Kountz Line, 122 U. S. 583. The condition of a contract, therefore, confining defendant's liability to its own line must necessarily be limited in its operation to such other connecting lines only as may have remained under their own separate and independent management. This 'arrangement' or contract for the operation of one line by the other was to extend to the latter part of the year 1887, or about one year later than the date of the injury to Mrs. Howard. It follows, therefore, that if nothing had occurred in the meantime to change the arrangement aforesaid, the condition of the ticket would not prevent recovery in this action if the injuries received by Mrs. Howard were caused by the carrier's negligence."

In addition to the evidence on this point summarized above, the plaintiff read a deposition of J. D. Yarrington that had been taken on behalf of the defendant. The witness resided near Lexington, Kentucky, the eastern terminus

of the Kentucky corporation, and said that in November, 1886, he was superintendent thereon "of the division operated at the time, I believe, by the Chesapeake and Ohio Railway Company." He was then asked this question by defendant's representative in taking the deposition "Do you mean to say that it was then being operated by the Chesapeake and Ohio Railway Company, or the N. N. & M. V. Co.? If you cannot state positively, give your best impression." He answered: "I am not clear as to which."

H. W. Fuller, who had been from 1883 to 1886, general passenger agent of the defendant and had followed into the service of the lessee of that company in 1886, then into that of the receiver appointed for both lessor and lessee in October, 1887, and finally back into that of the defendant upon the return of its railway to its own possession some time after, in the same capacity, was introduced as a witness, first by the plaintiff and afterwards by the defendant on the last trial.

It would occupy considerable time to review this evidence at length, and we think it sufficient to say, after its careful examination, that it does not materially alter the substance of his former deposition.

We are, therefore, of the same opinion as before, that the evidence was properly submitted to the jury.

III.

Legal Effect of Lease of Chesapeake and Ohio Railway in June, 1886, to Newport News and Mississippi Valley Company.

3. The next point is, the legal effect of the lease of the defendant's railway, in June, 1886, to the Newport News and Mississippi Valley Company (called the Connecticut corporation) upon the defendant's liability for the injury received by the plaintiff in November, 1886.

Referring to the same contention on the former appeal, that this lease had necessarily terminated the "arrangement" by virtue of which the defendant had operated the railroad of the Kentucky corporation, it was then said:

"The chief point of defendant's contention is that the arrangement had come to an end prior to the accident, in so far as defendant was concerned, by the lease of its line to the Newport News and Mississippi Valley Company. The

evidence in support of this contention shows that in January and June, 1886, respectively, the defendant and the Elizabethtown, Lexington and Big Sandy Railway Company had entered into contracts with the Newport News and Mississippi Valley Company for the lease of their lines for 250 years, upon an annual rental of $5,000. Collis P. Huntington signed the defendant's lease for each company as president. Though not president of the Kentucky corporation, he controlled it absolutely. This was all done in execution of his plan for a great Atlantic and Pacific railway system. Referring to the arrangement aforesaid, under which the defendant had operated the two lines of railway, the witness said: 'The organization of the Newport News and Mississippi Valley Company terminated the contract, I suppose, by force of the arrangement then made. It was terminated in the same manner it was made, by direction of Mr. Huntington; Mr. Huntington directed Mr. Smith to operate the properties, as I have indicated, and upon the formation of the Newport News and Mississippi Valley Company and the execution of the leases, he directed the operation of the line to be had in accordance with these leases.' This general lessee corporation was incorporated by the legislature of the State of Connecticut, March 27, 1884, under the name of the Southern Pacific Company, which was changed by an amendatory act, March 10, 1885, to that of the Newport News and Mississippi Valley Company. This act of incorporation is not set out in the record, and it does not appear what express powers it was authorized to exercise outside the limits of that State. One clause is given, however, which expressly forbids the power to 'make joint stock with, own, hold or operate any railroad in the State of Connecticut.'"

It was then further said: "There is nothing in the record to show that the State of Virginia ever authorized the lease by defendant of its railway. Nor does it appear that the existence of the Newport News and Mississippi Valley Company had ever been recognized by that State, or the State of Kentucky, much less the power conferred upon it to lease and operate a railway therein."

It was then held that in the absence of the express authority of the State, the lease was void and had no effect upon the liability of the defendant for the acts of its pretended lessee in operating the road. It was also held that

this Connecticut corporation, no matter what express powers it might have been authorized to exercise outside of that State, had, by the express prohibition of the exercise of those powers therein, been discredited and practically expelled from its domicile; and that other States were not bound by any kind of courtesy or comity to treat it with more consideration than its creator had done. In that connection, however, it was said: "Had this corporation been recognized in the exercise of these powers by the Court of Appeals of Virginia we would feel bound to follow its decision and give effect to the lease within the limits of that State."

IV.

Effect of Legislation of Virginia and West Virginia Claimed as a Ratification of This Lease.

On the last trial, defendant undertook to prove by certain acts of the legislatures of Virginia and West Virginia, regularly introduced in evidence, and by certain decisions of the courts of last resort in those States, the grant of the power, and its complete recognition, to make the lease aforesaid by the defendant to the Connecticut corporation.

These acts are here recited as they appear in the record:

"(1.) Chap. 219. An act to ratify and confirm the lease of the Chesapeake and Ohio Railway to the Newport News and Mississippi Valley Company, approved May 14th, 1887.

1. Be it enacted by the General Assembly of Virginia, That the lease made by the Chesapeake and Ohio Railway Company to the Newport News and Mississippi Valley Company, of its railroad, property and rights, bearing date on the 15th day of June, eighteen hundred and eighty-six, be and the same is hereby ratified and confirmed; provided, however, that the said Newport News and Mississippi Valley Company shall pay all taxes assessed upon its property, or the property of the Chesapeake and Ohio Railway Company in lawful money and not in coupons.

2. This act shall be in force from its passage."

"(2.) A duly certified copy of section 53 of chapter 54 of the Code of West Virginia, as the same was enacted February 5, 1883, and remained in effect unamended until February 22, 1889, attested March 28, 1898, by the Secretary of State of West Virginia, with the great seal of the State affixed thereto; so much of which as is relevant to this case being as follows:

"No railroad corporation owning or operating a railroad wholly or in part within this State shall consolidate its capital stock with any other railroad running a parallel or competing line, without the consent of the legislature; but any such railroad corporation, whose line of railroad is made or is in process of construction, may merge, or consolidate with, or lease its railroad, or any part thereof, for a term of years, to any other corporation owning or operating any connecting line of railroad, whose line of road is completed, or is in process of construction, wholly or partly within this or an adjoining State, in order to make a continuous line of railroad, to be run and operated with or without changes of cars or break of bulk or exchange or transfer of passengers or freight."

"A duly authenticated copy of another act passed on the 18th day of March, 1882, and in force November 16, 1886, amending and re-enacting various sections of chapter 24 of West Virginia, as follows:

"30. Any corporation duly incorporated by the laws of any State or Territory of the United States or of the District of Columbia, or of any foreign country, may, unless it be otherwise expressly provided, hold property and transact business in this State, upon complying with the requirements of this section, and not otherwise. Such corporation so complying shall have the same rights, powers and privileges and be subject to the same regulations, restrictions and liabilities that are conferred and imposed by this and the fifty-second and fifty-third chapters of this code on corporations chartered under the laws of this State. Every such corporation shall file with the secretary of state a copy of its articles of association, and of the law or authority under which it is incorporated. The secretary of state shall issue to every such corporation complying with the provisions of this section a certificate of the fact of its having done so, which certificate shall be filed and recorded in the clerk's office of the county court of the county, or one of the counties, in which its business is conducted. Such corporation shall also file in said clerk's office a copy of its charter, to be kept and preserved therein. Every railroad corporation doing business in this State under the provisions of this section, or under charters granted or laws passed by the State of Virginia or this State, is hereby declared to be as to its works, property, operations, transactions and busi-

ness in this State, a domestic corporation, and shall be so held and treated in all suits and legal proceedings which may be commenced or carried on by or against any such railroad corporation, as well as in all other matters relating to such corporation. No railroad corporation which has a charter or any corporate authority from any other State shall do business in this State as the lessee of the works, property or franchises of any other corporation or persons, or otherwise, or bring or maintain any action, suit or proceeding in this State until it shall in addition to what is hereinbefore required, file in the office of the secretary of state, a writing duly executed under its corporate seal accepting the provisions of this section and agreeing to be governed thereby; and its failures so to do, may be pleaded in abatement of any such action, suit or proceeding, but nothing herein contained shall be construed to lessen the liability of any corporation which may not have complied with the requirements of this section, upon any contract or for any wrong."

"(3.) The defendant, by its counsel, then offered and read in evidence the duly authenticated copy or copies of the articles of association of the Newport News and Mississippi Valley Company, and the law and authority under which said company was incorporated, as the said articles and authority are of record in the office of the secretary of state of West Virginia, being, first, the act of the General Assembly of Connecticut approved March 27, 1884, incorporating the Southern Pacific Company, with the grant of power to buy, lease, operate railroads in any State or Territory of the United States or in any foreign country, heretofore mentioned and described in Exhibit H. T. W. No. 7 to the deposition of H. T. Wickham, fixing the capital stock of said corporation at $1,000,000, divided into shares of $100 each, and providing that whenever $500,000 shall be subscribed and ten per cent. of said subscription shall be paid in cash the stockholders of said corporation may organize the same, and said corporation may proceed to do business; second, the affidavit of I. E. Gates, secretary of the Southern Pacific Company, showing the acceptance of said charter by the vote of the majority of the corporation and the subscription of $500,000 of the capital stock of said company on the 10th day of May, 1884, and the payment in cash of ten per cent. of such subscriptions at the

time of subscription, the organization, adoption of by-laws, and election of board of directors of said corporation; third, the act or resolution of the Connecticut legislature approved March 19, 1885, changing the name of the Southern Pacific to the Newport News and Mississippi Valley Company, with the powers and privileges and subject to the liabilities belonging to or incurred by the company under its former name, as if said change had not been made, each and every one of the foregoing papers being accompanied by the certificate of the secretary of state of Connecticut that the same is a correct copy of the record of file in his office.

" Next the copy or copies of the same articles of association and law and authority of incorporation of the Newport News and Mississippi Valley Company, as the same are of record in the clerk's office of the county court of Kanawha county, West Virginia, with the certificate of the clerk of said court, duly authenticated according to Federal law, that the same is a true copy of the record in his office."

(4.) There was next offered the certificate of the secretary of state of West Virginia, under date of July 27, 1886, in the usual form, showing the filing of the charter, in compliance with the law.

"(5.) And next the duly authenticated copy of the acceptance of the Newport News and Mississippi Valley Company of the provisions of the Code of West Virginia, and agreement to be governed thereby, in words and figures as follows:

"The Newport News and Mississippi Valley Company, a corporation created, organized and existing under and by virtue of an act or joint resolution of the General Assembly of the State of Connecticut, passed at its January session, A. D. 1884, and approved March 27th, 1884, a copy of which is herewith filed, and under and by virtue of a subsequent act or joint resolution, passed by the General Assembly of said State at its January session, A. D. 1885, approved March 19th, 1885, a copy of which is also herewith filed; desiring to do business as such corporation in the State of West Virginia, as lessee of the works, property and franchises of the Chesapeake and Ohio Railway Company, hereby accept the provisions of section 30, of chapter 54 of the Code of West Virginia, and agrees to be governed thereby.

"In witness whereof, the said Newport News and Mississippi Valley Company has caused its corporate seal to be hereto affixed, and this instrument of writing to be signed

on its behalf by its president, and attested by its secretary, this 21st day of July, 1886.

"NEWPORT NEWS AND MISSISSIPPI
[SEAL] VALLEY CO.
By C. P. HUNTINGTON, *President.*

"Attest: I. E. GATES, *Secretary.*"

V.

This Subsequent Legislation can not Affect the Plaintiffs' Vested Right.

(6.) The decisions of the courts of said States claimed as recognizing the authority of the Newport News and Mississippi Valley Company will be mentioned later.

The act of the General Assembly of Virginia was not enacted until after plaintiff's right of action against the defendant had accrued. Whether that act, which took effect from its passage, was intended to operate prospectively only, and not to affect intervening rights, as has been argued, need not be considered.

Granting that it was intended to be retrospective, as well as that it completely precludes the State from action in respect of the previous illegality of that lease, it can not take away the right of the plaintiff that had become vested during the intervening time. Webster *vs.* Cooper, 14 How. 488, 501; Cook *vs.* Tullis, 18 Wall. 332, 338; Pickering *vs.* Lomax, 145 U. S. 310, 315; Morley *vs.* Lake Shore Railway Co., 146 U. S. 162, 168; 1 Eneye. L. (2d Ed.), 1215.

VI.

Status of Connecticut Company in West Virginia.

We will now consider the status of the Connecticut corporation, as lessee of the part of defendant's road situated in the State of West Virginia, under section 53 of chapter 54 of the code of that State, and its acceptance of the provisions of section 30, chapter 24, hereinabove set out.

It will be observed that section 53 limits its permission to railroads, wholly or in part within said State, to merge, consolidate with, or lease their railroads, or any part thereof, "to corporations owning or operating any connecting line of railroad whose line of railroad is completed, or is in process

of construction, wholly or partly within this or an adjoining State." Now it clearly appears from the evidence that the Connecticut corporation, at the time of the accrual of plaintiff's right of action, had not built or undertaken to build a railroad anywhere; and that it has not constructed one, either wholly or in part, since. Nor was it at the time, as we have heretofore held, lawfully operating the connecting line of this defendant in the State of Virginia. The same may be said of the connecting line in the State of Kentucky, for no attempt has been made to show the existence of any statutory authority of that State for its control or operation by the Connecticut corporation. In using the words, "operating any connecting line of railroad," we must presume that the legislature of West Virginia meant a *bona fide* operation under the authority of a lawful contract therefor, and nothing less.

Now, in contemplation of law, both of these connecting lines in Virginia and Kentucky, respectively, were being operated, at the time, by their lawful owners, notwithstanding the immediate and active, but unauthorized and unconfirmed, agency of the Connecticut corporation therein.

The permission received by the Connecticut corporation to do business in West Virginia, through compliance with the provisions of section 30, chapter 24, aforesaid, could not confer upon it the power to take a lease of defendant's railway in that State. The prohibition of section 53, above recited, still applied; for if there be any inconsistency between the two sections that would prevent their standing in force together, it is section 30 that must give way, because the other was last enacted.

That the Connecticut corporation, in accepting the provisions of section 30, expressly declared its desire to do business in the State "as lessee of the works, property and franchises of the Chesapeake and Ohio Railway Company," and that the secretary of state by accepting the same and issuing the usual formal certificate may have assented thereto, are facts entitled to no weight whatever. That officer had no authority to bind the State to a greater extent than that expressly conferred upon him by law. And had the parties behind the Connecticut corporation taken out a regular charter under this general incorporation act, with an express declaration of powers more comprehensive still, its provisions would have no effect in law when not in harmony with

the public policy of the State as shown in the general body of its laws. Oregon Rwy. & Nav. Co. *vs.* Oregonian Rwy. Co. Limited, 130 U. S., 1, 24, 26.

In this connection it will not be irrelevant to state certain facts in respect of the incorporation of the Chesapeake and Ohio Railway Company, and the character of the lease made in its name to the Connecticut corporation.

Apparently its original incorporation was by the State of Virginia, and it afterwards had standing in West Virginia as a corporation, and was treated as a corporation of that State. Whether the members of the Virginia corporation organized another corporation under the same name in West Virginia, under express enactment of the legislature, or whether the Virginia corporation, as already organized, was licensed or permitted to extend its railway into and through the State, and given standing as a domestic corporation for general purposes, does not appear. Either might have been lawfully done. St. L. & S. F. RR. Co. *vs.* James, 161 U. S., 545, 561, 562. Whatever the fact may be, it evidently acted as one corporation, with but one set of officers and one management; all of which it might lawfully have done, in either case, by the express permission of the State of West Virginia. Graham *vs.* Boston, etc., RR. Co., 118 U. S., 161, 169; St. L. & S. F. RR. Co. *vs.* James, 161 U. S., 545.

The lease of June 15, 1886, recites that it is made by the "Chesapeake and Ohio Railway Company, a corporation existing under the laws of the States of Virginia and West Virginia, party of the first part."

The yearly rental of $5,000 is required to be "applied by the party of the first part to the expense of maintaining and keeping up its corporate organization under the laws of the State of Virginia and West Virginia." The road leased is that "now owned and operated by the party of the first part," with all branches, sidings, etc.—in detail, all property of every nature whatsoever—"extending from Phœbus in the State of Virginia to Huntington in the State of West Virginia," including the rights under agreement with the Kentucky corporation on the line between Huntington and Big Sandy. The execution of this lease shows—Chesapeake and Ohio Railway Company, by C. P. Huntington, president; and Newport News and Mississippi Valley Company, by C. P. Huntington, president. There was no separate lease of the West Virginia part of the railway, and no pro-

vision for its separate operation in that State. Executed by the one corporation, and indivisible in its terms, it was wholly void until ratified, as we have seen, by the State of Virginia.

VII.

Doctrine of Ultra Vires has No Application to Torts.

4. Based upon the conclusion that there was no grant of power under which the Chesapeake and Ohio Railway Company of Virginia and West Virginia could lease, or assume the operation of, the railway of the Kentucky corporation, it is contended that it can not be held liable for an injury done thereon in the execution of this *ultra vires* and prohibited power.

It does not follow, however, that because the Kentucky corporation, if sued, could not have escaped liability by reason of its unlawful surrender of its road to the control of the defendant, that the latter can escape liability for its own torts committed during such unauthorized control. A corporation may have the capacity to do a wrong, without, at the same time, having the power to engage in the business wherein that wrong shall have been committed. There must necessarily be a difference between the capacity of a corporation to commit a wrong and its capacity to make a contract in excess of its granted powers. Parties who contract with it are under no compulsion, and have every opportunity in fact, besides being presumed in law, to know the scope of its powers. Where a tort is committed, the injured person is brought into relations with the corporation against his will. He has been put upon no inquiry, occupies a situation imposed upon him, and has no reasonable opportunity to protect himself.

Public policy, looking to the necessary protection of life and property, demands that liability for torts, committed by corporate agents under the direct authority of the corporation, be made an exception to the general rule in respect of acts *ultra vires*. In this instance the act was that of the defendant and though done without lawful authority it can not escape liability therefor. Whatever may be the conflict of authority elsewhere the doctrine has been firmly established by the Supreme Court of the United States that "corporations are liable for every wrong they commit and in

such cases the doctrine of *ultra vires* has no application." National Bank *vs.* Graham, 100 U. S. 699, 702; Salt Lake City *vs.* Hollister, 118 U. S. 256, 260; D. & R. G. RR. Co. *vs.* Harris, 122 U. S. 597, 608; Lake S., etc., RR. Co. *v.* Prentice, 147 U. S. 101, 109; see, also, Bissell *vs.* Railroad Co., 22 N. Y. 298; Buffett *vs.* Railroad Co., 40 N. Y. 298; Nims *vs.* School District, 160 Mass. 177; Hutchings *vs.* W. & A. RR. Co., 6 Heiskell, 634; N. Y., L. E. & W. RR. Co. *vs.* Haring, 47 N. J. L. 137; C. R. & B. Co. *vs.* Smith, 76 Ala. 572.

VIII.

Decisions Cited of Courts of Virginia and West Virginia Irrelevant.

The decisions of the courts of Virginia and West Virginia, cited by counsel for defendant as showing a recognition of the lease by the defendant to the Connecticut corporation, amount to nothing more, practically, than an affirmation of the foregoing doctrine. See Stewart's Admr. *vs.* N. N. & M. V. Co., 86 Va., 988. Bullington *vs.* N. N. & M. V. Co., 32 W. Va., 437; Humphreys *vs.* N. N. & M. V. Co., 33 W. Va., 135. In no one of these was the validity of the lease involved. Besides section 30, chap. 24 of the Code or statutes of West Virginia declares that a failure to comply with its provisions shall not lessen the liability of the corporation "upon any contract or for any wrong." See, also, Ricketts *vs.* C. & O. Rwy. Co., 33 W. Va., 434, where the defendant was held liable for an an injury to a passenger on the Kentucky division in 1885. In another case cited (Reece *vs.* N. N. & M. V. Co., 32 W. Va., 165), the only question involved was the right of the Connecticut corporation to remove a cause to the United States court. Its right to do business as a corporation in West Virginia, simply, was secured by its filing its foreign charter and acceptance of the provisions of the law of that State; but this, as we have seen, did not confer the power to lease the defendant's railway, and that question did not arise in the case.

IX.

Further Consideration of the Alleged Leases from the Virginia and Kentucky to the Connecticut Company.

5. After charging the jury that the plaintiff could not recover against the defendant by reason merely of the ticket

that had been sold by it, and that to entitle her to a verdict it must be found from the evidence that the defendant, at the time of her injury upon the Kentucky road, controlled the same, operated it and ran trains upon it, manned by its employees and controlled by its officers and agents, the court proceeded, under objection of the defendant, to charge the jury in respect of the effect of the lease by defendant to the Connecticut corporation, as follows:

"But if you find from the evidence that the Chesapeake and Ohio Railroad Company, immediately before the execution of this lease just mentioned, was operating and controlling this Elizabethtown road, then you would naturally pass to the next step, which is, whether the execution of this lease and the facts and circumstances attendant upon it ended that arrangement, so that the Chesapeake and Ohio Railroad Company ceased at the time of the execution of that lease to control and run the trains upon that road?

"In considering this last question it is proper for you to consider also the lease which was made by the Chesapeake and Ohio Railroad of its own road to this Newport News and Mississippi Valley road. There is a lease in evidence here dated, I think, the first of July or thereabouts, made by the Chesapeake and Ohio Railroad itself to the Newport News and Mississippi Valley road, and it is claimed by the defendant that after the execution of this last lease the whole line, not only the Elizabethtown road, but the Chesapeake and Ohio itself, was controlled and run by this Newport News and Mississippi Valley road, and that the Chesapeake and Ohio had no further agency or control in the running of either of those roads; and that is the question for you to determine, whether at the time of the execution of those leases the Chesapeake and Ohio Railroad Company abandoned that business and turned it over to this new company, and this new company ran the trains on those roads after that time and was running them at the the time of this accident? The plaintiffs contend that that was simply a formal matter; that this Newport News and Mississippi Valley Company was a mere corporation on paper, so to speak, and that there was no actual delivery of posessession of the roads or stock of this new company; that the same officers and agents and men who had controlled and done business before did it subsequently, and that it was really the Chesapeake and Ohio Railroad Company doing this same business

under the name of the Newport News and Mississippi Valley road; and that is the question for you to determine really, the question whether that transaction was one in good faith as a business transaction or whether it was a transaction upon paper to accomplish some ulterior purpose of the parties who engaged in it.

"You have heard all the evidence upon the question. It is proper for you to take in consideration not only the course of business there and what was done afterwards; what became of the Chesapeake and Ohio Railroad Company after the execution of these leases; what, if anything, it did; whether it ever resumed business, and how it and its officers treated this lease. That is all competent for you to consider. But the question finally resolves itself into the one I have tried to make plain to you, and that is whether at the time of this accident the Chesapeake and Ohio Railroad Company was the efficient agent which ran and controlled the trains that ran over the Elizabethtown, Lexington and Big Sandy railroad. If, so, they are liable for any negligence that occured on that train; if not, they are not liable."

This instruction, we think, is in accord with the opinion expressed on the former appeal.

X.

Further Consideration of Status of Connecticut Company.

On this trial it was shown that the Connecticut corporation, discredited and exiled by the State that had authorized its organization, had not been recognized by the State of Virginia, where the original and chief incorporation of the defendant had been had. There was nothing to show that it had ever really organized under the act of incorporation beyond the affidavit of one I. E. Gates, claiming to be its secretary, that was filed with the acceptance of the provisions of the laws of West Virginia in the office of the secretary of state of that Commonwealth, to the effect that the $500,000 of authorized capital stock had been subscribed, ten per cent. thereof paid in, and a board of directors elected.

This may have entitled it to recognition in West Virginia as a *de facto* corporation for the purposes required and permitted by its general incorporation laws; but is not proof of

its organization in this case. It has been shown that it built and owned no road, and had no rolling stock. Collis P. Huntington as its president, and as president of the defendant corporation, and as the absolute controller of the Kentucky corporation, ran the railways of the latter as one line, and executed the agreements and leases that were offered in evidence to carry out certain plans of his own. As a creditor of the defendant, of which he was president, he subsequently caused a receiver of its property to be appointed, and when that proceeding ended, without foreclosure or sale, the defendant resumed control and operation of the roads in Virginia, West Virginia and Kentucky, and has maintained the same ever since. The lease that it had made to the Connecticut corporation for two hundred and fifty years, and that had been ratified in the meantime by the State of Virginia, suddenly ended, in some manner wholly unexplained and apparently inexplicable save upon the theory propounded in the charge, that it was a "transaction upon paper to accomplish some ulterior purpose of the parties who engaged in it," and the Connecticut corporation disappeared from sight.

XI.

Question of Validity of These Leases Properly One for the Jury, Were it a Question of Fact.

The general officers of the defendant, after the said lease was executed, remained in the same positions in obedience to the orders of the same person as president, C. P. Huntington; the trains ran as before; the route was advertised as that of the Chesapeake and Ohio Railway and Chesapeake and Ohio route; the letter-heads used by the general solicitor of the lessee in New York, who had also been the general solicitor for the defendant, in some correspondence concerning this case, were those of the defendant; a physician employed to examine the plaintiff understood that he was employed by the Chesapeake and Ohio Railway Company, although the check for his services was signed by the Connecticut corporation; the superintendent of the division on which the accident occurred believed that it was operated at the time by the Chesapeake and Ohio Railway Company; and the ticket upon which the plaintiff traveled had been printed by the defendant, issued in its name and recognized as valid on the entire route. It contained nothing referring

to the Connecticut corporation, much less recognizing its nominal control, even by lease or otherwise.

Lastly, the release obtained from the plaintiff, six days after the accident, was a printed form providing not only for the discharge of all claims against it, but also against "their lessors or predecessor companies."

With evidence of these facts, and others that have been before referred to, we think it was not error to refer to the jury the question: "Whether that transaction was one in good faith as a business transaction, or whether it was a transaction upon paper to accomplish some ulterior purpose of the parties who engaged in it."

XII.

But as These Leases Were Invalid Under Any Aspect of the Evidence, the Verdict of the Jury to the Same Effect was no Injury to the Plaintiff in Error.

Whilst a corporation is an artificial person in law, having an individuality or entity separate and distinct from that of its stockholders, that doctrine, so well established and so necessary to the legitimate ends for which corporations are created and permitted to exist, will not necessarily bar an inquiry into the fact whether the nominal corporation is merely a pretense that has been raised for the sole purpose of acting as a mask behind which so-called stockholders and officers may, with impunity, perpetrate frauds upon the public and the courts and work wrongs, without remedy, upon individuals. Lehigh Mining & Mfg. Co. *vs* Kelly, 160 U. S. 327, 329; Montgomery *vs.* Forbes, 148 Mass. 249.

It may be remarked, however, of the foregoing charge that it was given upon the assumption that the leases offered in evidence were *prima facie* valid, under the legislative authority that had been offered in evidence. As they have been held to be invalid, the verdict of the jury to the effect that the defendant was at the time of the injury actually operating the road and the train upon which it occurred, could not have been materially affected by this charge even if it had been erroneous.

XIII.

Question of Defendants' Negligence.

6. The next question is on the error of the court, as assigned, in submitting the question of negligence, as the

cause of the injury, to the jury upon the evidence introduced.

The charge upon this branch of the case is here given:

"If the jury find from the evidence that the accident to the train on which the plaintiff was traveling resulted from a latent or secret defect or flaw in the flange of a wheel on the Piedmont Air Line coach which careful inspection could not have discovered before the accident, they are instructed that the plaintiff cannot recover in this action, even if the train on which the accident occurred were that of the defendant.

"That is, if the accident happened from that broken flange and the liability of that flange to break could not have been discovered by the use or reasonable inspection prior to the accident, then it is what the law would treat as an accident that could not have been prevented, and nobody is liable for it.

"But if the accident happened from a broken flange and that break or flaw or weakness, if there was any, in the flange or wheel could and would have been discovered by the use of reasonable care in inspecting and testing the wheel before the accident, and the company failed to use that care or make that inspection, then there was negligence, and the defendant would be liable if you find the other points in favor of the plaintiffs. Or if the evidence shows to your satisfaction, by a preponderance of it, that the accident happened in some other way, from some other defect, too rapid running over the particular point where they were running, or any other negligence or carelessness of the parties running the train, the defendant would be liable."

To the last sentence of the foregoing an exception was taken by the defendant.

We think there was evidence which required the court to submit the question of negligence to the jury. In the first place there is the presumption of negligence arising from the breaking down of the wheel of one of the cars in the train. Weaver *vs.* B. & O. RR. Co., 3 App. D. C., 436, 452, and cases therein cited. (*See Jones on Evidence, Sec. 181 and cases cited.*)

Then there was evidence by one witness tending to show that the car had gotten off the track after leaving Louisville and before getting out of the yard, and that something was the matter with the spring. He said he heard this explan-

ation. No objection was made to it as hearsay, and presumably it was admissible as part of the *res gestæ*.

Another witness, a civil engineer of a railway company, was a passenger upon the same train and testified concerning the accident and its cause. He stated it as his impression that the accident was caused by the first truck of the second smoker leaving the rails on account of reckless running, "and the broken spring in the car just preceding it had also a part in the cause." The first witness also testified to the very rapid speed of the train immediately before and at the time of the derailment.

XIV.

Question as to Validity of Release Executed by the Plaintiff, Laura P. Howard.

7. The last question to be considered arises on the pleading, evidence and charge of the court in respect of the instrument executed by Mrs. Howard releasing the Newport News and Mississippi Valley Company and its "lessors or predecessor companies," in consideration of $200, from all liability on account of the injuries that she had received.

When this case was before us on the former appeal, there was no evidence of the laws in force in respect of the separate rights of married women, either in Kentucky, the place of injury, or Indiana, the domicile of the husband of Mrs. Howard. Mrs. Howard was, herself, living temporarily in the District of Columbia and engaged as a clerk in the Department of Agriculture.

It was then held, following (with the expression of some doubt) the decision in Snashall *vs.* Railway Co., 19 D. C., 407, 411, that the right of action for personal injuries received by the wife, was not her sole, separate property under the married woman's act of Congress then in force in this District, and unamended, and hence could not be discharged by her alone.

Upon the last trial, defendant offered evidence of the laws in force, at the date of the accident and the release, in the States of Indiana and Kentucky respectively, as follows: Revised Statutes of Indiana:

"Sec. 5130. A married woman may carry on any trade or business and perform any labor or service on her sole and separate account. The earnings and profits of any married

woman, accruing from her trade, business, service or labor, other than labor for her husband, or family, shall be her sole and separate property.

"SEC. 5131. A married woman may bring and maintain an action in her own name against any person or body corporate for damages for any injury to her person or character, the same as if she were sole; and the money recovered shall be her separate property, and her husband in such case shall not be liable for costs."

Act of the General Assembly of Kentucky:

"SEC. 1. That the wages and compensation of married women, for service and labor done and performed by them, shall be free from the debts and control of their husbands; and their employers are allowed to pay such wages and compensation directly to such married women, and payment to them shall be a full discharge and acquittance of the employer."

Plaintiff then offered evidence tending to show that deception had been practiced upon her in obtaining her signature to the release.

XV.

Character and Extent of Mrs. Howard's Injuries.

Before stating this it is not irrelevant to state the facts concerning the character of Mrs. Howard's injuries, as testified to by Dr. Chrystie, a New York specialist in spinal diseases. He said that:

"Mrs. Howard placed herself under his treatment early in 1887, and has been under his treatment ever since. She is suffering from an incurable spinal affection which is progressive, occasioning great suffering and almost total disability. During the first part of this treatment she was in New York under his care for the greater part of the time. During the subsequent years she came there about once or twice a year. Witness had contrived and made for her an apparatus grasping the hip and extending up to the shoulders and giving support in front, which steadies the back as a broken bone would be steadied, and gives her partial relief, but the disease is located so low down, so much superincumbence of weight from above, that it does not give her complete relief. It is made of steel and should be worn constantly. She should sleep in it. It is neces-

sary for her to wear it for her comfort as well as for the protection of her backbone. The disease has progressed slowly. If it had not been for this spinal assistant I think she would have had complete paralysis."

XVI.

Circumstances Attending Execution of Release.

She had been seen and examined by the surgeon of the railway company on the day of her injury, and had come east, as far as Clifton Forge, under his charge. She said that she was first called upon in Washington at the house of Mrs. Warder by an agent of the railway company, who enquired of her injuries; that she was very sick and hardly able to talk, and he told her he would send the surgeon. On the 24th of November, 1886, the surgeon came to see her, paid her $200, and obtained the execution of the release. The room was very dark when he came, and she was alone and suffering. He told her the company had sent her $200 to take care of her until she got up. She said to him that she felt badly and was afraid she would lose her position. He said, if you do, we will see you through. He did not read to her the release, nor did she read it. She was too ill to read it herself. He told her the paper was a receipt for money to tide her through, and she signed it, not knowing that it was a release, but supposing it to be, as represented, a receipt for money given to help her.

It is fair to say that the surgeon, who testified in the case, stated that he came to see Mrs. Howard and settle with her, at the request of the general solicitor of the company, because he had become acquainted with her; that he saw her in a room with ordinary light; that he told her he was there as the representative of the railway company to try and make good, as far as they could see, her loss of time as a clerk; that he read the paper to her, and upon her expression of willingness to accept the $200, paid her that sum, and obtained her signature. He signed his own name as a witness. He further said that there was an elderly woman in the room at the time. Mrs. Warder, at whose house this occurred, stated that she showed the surgeon to the room, left him there with Mrs. Howard alone, and did not return.

XVII.

No Objection Taken Upon the Trial to this Evidence. Such Objection can not be Taken in Appellate Court.

The foregoing evidence, on the part of the plaintiff, was offered without objection or exception, but it is now contended that it was error to submit the question of fraud raised thereby to the jury, because there was no allegation of fraud in the pleadings. It appears from the pleadings that plaintiff merely joined issue upon the plea setting up the said discharge.

The release might have been proved by defendant under the general issue, without a special plea. Brown *vs.* B. & O. RR. Co., 6 App. D. C., 237, 242. But whether, without amendment replying to the special plea, the evidence might have been admitted, it is not now necessary to inquire. The objection comes too late, when raised for the first time on appeal. Had it been made at the time the plaintiff would, doubtless, have cured the defect.

Washington Gas Light Co. *vs.* Poore, 3 App. D. C. 127, 135; De Forest *vs.* U. S., 11 App. D. C., 458, 460.

The charge to the jury, founded on this evidence, is in the following words:

"If you shall find from the evidence that at the time the plaintiff, Mrs. Howard executed the release given in evidence she was in bed and ill, and suffering to such an extent that it was a reasonable act upon her part to sign the paper without reading it, and for that reason she did not read it, but relied upon the representations of its contents made by Dr. Brock, and that the latter did not read it to Mrs. Howard, but stated to her that it was a receipt for $200 which he paid her at that time, and that she relied upon said statement and signed the release under the belief that it was a receipt only, and did not know that it was a release until some time afterwards, then the said release was at the time she signed it and is now void as a release, and can not prevent the plaintiffs from recovering if the jury shall find them otherwise entitled; but if Mrs. Howard was in such physical condition as to make it unreasonable, in your judgment under the evidence, for her to rely upon the representations of Dr. Brock instead of reading the paper, or if Dr. Brock read it to her, or if he told

her it was a release, then or in either of those events it is valid and bars the action, and your verdict should be for the defendant without inquiring further."

There was no error in this instruction. It defines the issue made by the evidence, and states correctly the law applicable thereto. Union Pacific Rwy. Co. *vs* Harris, 158 U. S. 331; Luster *vs.* C. & N. W. R. Co., 71 Wis. 391, 397; C., R. I. & P. R. Co. *vs.* Lewis, 109 Ill. 120, 131.

In this view of the case, it is wholly unnecessary to consider the question now raised, whether the legal effect of the release should be governed by the law prevailing in Indiana, Kentucky or the District of Columbia. No special instruction was asked by the defendant; and the court having refused a prayer of the plaintiffs to the effect that, under the law in this jurisdiction the execution of the release by the wife alone was insufficient, charged the jury that, unless invalidated by the evidence tending to establish fraud in its procurement, the release would discharge the defendant from liability and entitle it to a verdict.

XVIII.

Question of Tender of the $200 Paid for Release.

8. One other contention of the appellant involving the effect of the release remains to be considered. This is that, assuming it to have been obtained by fraud, the plaintiff remained bound by it because of her failure to offer to return the money received at the time of its execution.

This question does not appear to have been raised by the defendant on the trial; at least, no specific instruction was asked, and there was no exception taken to the failure of the court to include it in the general charge. All that the bill of exceptions shows is, that counsel for defendant moved the court to instruct the jury, that if the plaintiff signed and delivered the release, then parole evidence is inadmissible to contradict and vary it, and the jury should therefore find for the defendant. This the court refused and exception was entered.

It then appears that thereafter plaintiff tendered counsel for defendant the sum of $200 in gold, which he declined to receive. Counsel for the defendant thereupon moved the court to strike out all of the parole evidence of the plaintiff seeking to vary or contradict the release, and this was also refused.

Taken in connection with the tender of the money, this last motion may be inferred to have been directed to this point; without this aid it would seem to have been directed to the point that, in a court of law, in this jurisdiction, a release under seal could not be impaired by parole evidence.

The case of Lyons *vs.* Allen, 11 App. D. C., 543, 549, distinctly holds the contrary, but it also holds that where a release has been pleaded and is sought to be avoided on the ground of fraud, the party alleging the fraud must, as a condition of his right to do so, first restore or offer to restore the consideration actually received. In that case, the plaintiff did not deny that he knew he was executing a release of the cause of action; on the contrary, he admitted that he had agreed to execute a release, but charged that the fraud practiced was in deceiving him in respect of the consideration promised. The instrument recited that he was to receive five dollars per week while he remained in the hospital on account of his injuries, whilst the consideration stipulated by him was five dollars per week until he should be able to work. Some of the cases relied on in the opinion in that case, draw a distinction not necessary therein to be made, between a case where one has executed a release, knowing it to be such, but induced thereto by fraudulent representations, and a case where he has been induced, by like means, to execute a release upon the supposition that it was an instrument of a distinctly different purport. Drohan *vs.* L. S., etc., RR. Co., 162 Mass., 435, 437; Mullen *vs.* Old Colony RR. Co., 127 Mass., 86, 89; and see, also, Bliss *vs.* N. Y. C. & H. RR. Co., 160 Mass, 447.

In this case, for example, the plaintiff contends, and the jury so found that the money was offered her as a gratuity by the railway company in consideration of her poverty and unfortunate condition, and that she was induced to believe that the paper executed by her was a mere receipt showing that the money had been paid by the representative of the company, and was in no sense a release of her cause of action.

If offered and received as a gratuity, the instrument, though in form a release is nothing more in reality than a receipt for the money. Not being a release, her avoidance of its effect as such does not involve the rescission of the instrument, but rather its virtual reformation into the harm-

less thing that it was actually represented and supposed to be, when its execution was obtained. Being a receipt merely for money received for another and distinct purpose, it is not necessary to be set aside in order to maintain the action.

Even if it were a case like that of Lyons *vs.* Allen, *supra*, we would be inclined to hold that the rule was satisfied by the tender of the money before the case was finally submitted to the jury. Smith *vs.* Holyoke, 112 Mass. 517.

As no objection had been made to the evidence on this ground, when offered, the earliest occasion to tender the money was when the foregoing motions were made; and this was then promptly acted upon. The defendant was in no position to object, and did not then object so far as the record shows, that the money ought to have been tendered to the Connecticut corporation, to which the release had been delivered, and could not be made to it (the defendant).

Upon that theory, now for the first time suggested, the release would constitute no defense to the defendant except upon the ground that, being a joint tort-feasor, a discharge of one is a discharge of all. The entire defense, however, from plea to final judgment has been maintained in opposition to that idea. Offered as a direct discharge of the defendant itself, and as inuring to its benefit as one included among the "lessors or predecessors" of the Connecticut corporation, it cannot be permitted, at this stage of the case at least, to say that the tender of the money was of no avail.

Having found no reversible error in the proceedings, the judgment will be affirmed, with costs; and it is so ordered.

Affirmed.

It is hoped that this plaintiff, so severely injured in November, 1886, will not see the century end and her wrongs still unredressed.

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Attorneys for Appellees.

No. 247.
Sup. Ct. Br. of Perry & Smith & Perry.

SUPREME COURT U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1899.

No. 247.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

WILLIAM P. HOWARD AND LAURA P. HOWARD, HIS WIFE.

Supplemental Brief of Defendants in Error.

R. ROSS PERRY.
JAMES FRANCIS SMITH.
R. ROSS PERRY, JR.

LAW REPORTER PRINT.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1899.

No. 247.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

WILLIAM P. HOWARD AND LAURA P. HOWARD, HIS WIFE.

Supplemental Brief of Defendants in Error.

Counsel for the defendants in error regret that they must object, as they hereby do, to the following statements in the brief of counsel for the plaintiff in error, *outside of the Record:*

Page 61. Statement in brief of the contents of an act of the General Assembly of Virginia in favor of the Chesapeake and Ohio Railway Company.

Pages 63 and 64. Quotations from advertisements contained in the Evening Star, of Washington, D. C.

Pages 66–67. Alleged *fac similes* of railroad tickets issued by other companies than those in question here.

Pages 74, 75, 76. Alleged contents of a proceeding *inter alios* in the Supreme Court of the District of Columbia.

Page 92. The assertion that the verdict in this case is a *vindictive verdict.*

I.

Service of process was properly had upon the agent of the plaintiff in error.

Revised Statutes D. C. Sec. 790:

> "In actions against foreign corporations doing business in the District, all process may be served on the agent of such corporation or person conducting its business, or, in case he is absent and cannot be found, by leaving a copy at the principal place of business in the District, and such service shall be effectual to bring the corporation before the court."

See pages 58 and 60 of the Record as to C. H. Chapin's connection with the Virginia and Connecticut companies.

There is no dispute that through trains ran from Washington to Louisville and return during all this period.

As to the law governing service of process, see the following authorities:

Railroad Company *vs.* Harris, 12 Wall. 65.
Barrow Steamship Co. *vs.* Kane, 170 U. S. 100.
Mutual Life Insurance Co. *vs.* Spratley, 172 U. S. 602.

II.

The Supreme Court of the District of Columbia, having jurisdiction of the subject matter of the suit, could render a binding judgment against a foreign corporation duly served with process. *Ibidem.*

III.

In any event, jurisdiction was acquired when the plaintiff in error, in order to secure the vacation of the judgment by default against it, consented to, and did, plead the general issue.

See Order of Montgomery, J. (Rec., p. 99).
Railroad Company *vs.* Brown, 17 Wall. 445.

IV.

The trial justice did not err in allowing an amendment of the *form* of action from *assumpsit* to tort.

Smith *vs.* Bellows, 77 Pa. St. 441.

This was in accordance with the law of the jurisdiction—

Magruder *vs.* Belt, 7 App. D. C. 303.
Morris *vs.* Wheat, 11 App. D. C. 201.

The Supreme Court of the United States has approved such practice.

Bamberger *vs.* Terry, 103 U. S. 40.
Chapman *vs.* Barney, 129 U. S. 677.

V.

As this amendment did not touch the *right* of action, the amended declaration was not by the mere amendment opened to the plea of the statute of limitations.

United States *vs.* O'Leary, 19 D. C. 118, 132.
Lewis *vs.* W. & G. RR., 6 Mackey, 557, 558.
Moses *vs.* Taylor, 6 Mackey, 278.
Guild, exr., *vs.* Parker, 43 N. J. L. 434.

VI.

The appointment of a receiver by the Virginia court did not operate *proprio vigore* a transfer of the property of the plaintiff in error within the District of Columbia.

Booth *vs.* Clark, 17 Howard, 322.

Especially would this be true in the case of a collusive suit.

Walters *vs.* Mortgage & Trust Co., 50 F. R. 316.

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VII.

This appointment did not *ipso facto* dissolve the plaintiff in error corporation.

Chemical National Bank *vs.* Hartford Deposit Co., 161 U. S. 1.

Texas & Pacific RR. Co. *vs.* Bloom's Admr., 164 U. S. 636.

VIII.

The defendant in error, Laura P. Howard, is not disentitled to recover because she was riding on a "scalper's" ticket.

Sleeper *vs.* Penn. RR. Co., 100 Pa. St. 259.

IX.

The Record shows the following facts as to the said Laura P. Howard:

1. She habitually chose the Chesapeake and Ohio Railway between Washington and Louisville when traveling alone, because she could go through without change of cars (Rec., p. 13).

2. On the occasion in question she read, in the Louisville Courier-Journal, the advertisement of that road which will be found at pages 20–21 of the Record (Rec., p. 13).

3. She bought a Chesapeake and Ohio railroad ticket from Louisville to Washington on the faith of that advertisement (Rec., p. 11).

4. With that ticket she went to First Street Station, Louisville, Kentucky, had her trunk checked with a Chesapeake and Ohio Railway check, and boarded a train marked with the card of the Chesapeake and Ohio train, on which train she was injured (Rec., p. 11).

5. After her injury, and while still on her journey on another train, Dr. Brock examined her and told her that he

was the chief surgeon of the Chesapeake and Ohio Railway (Rec., p. 12). He told another passenger, Hunt, the same thing (Rec., p. 16).

6. A few days after the accident, Mr. Frank Trigg, then an agent of the said railway (Rec., p. 14), called to see her about her injuries (Rec. p. 12).

8. Later, Dr. Brock called and told her that he had come to give her some money "to take care of her until she got up," and had her sign a paper which she was too ill to read, and which she supposed was a receipt for the said $200 (Rec., pp. 12, 84).

9. Later, the attorney for said railroad wrote to her then attorney a letter requesting permission for Dr. Meredith Clymer to examine her (Rec., pp. 48, 49): and Doctor Clymer says he did examine her, as he understood, for that railroad (Rec., pp. 48, 49).

10. Her injuries are most unusual, distressing and disabling. Her sufferings are very great and her condition is incurable and is constantly getting worse (Rec., pp. 13, 14, 17, 18).

X.

The Record shows the following facts as to the railroad involved in this case:

(In this summary the Chesapeake and Ohio Railway will be called the Virginia Company, the Elizabethtown, Lexington and Big Sandy Railroad Company will be called the Kentucky Company, and the Newport News and Mississippi Valley Company will be called the Connecticut Company).

1. The Virginia Company originally ran from Fortress Monroe in Virginia to Huntington in West Virginia.

2. In 1879 it wanted "a western outlet," and, *to get it*, made a contract with the Kentucky Company by which the Virginia Company agreed to bridge the Big Sandy River and to allow the Kentucky Company the use of this bridge and of a part of the Virginia Company's road (Rec., pp. 31, 32).

3. In 1882 the Virginia Company operated the road of the Kentucky Company under an agreement set out at page 45 of the Record, which agreement was to continue for five years, until 1887 (Rec., p. 45). In fact *the Kentucky road appears to have been constructed for the purposes of the Virginia Company* (Rec., pp. 57, 63).

4. Under this arrangement the Virginia and Kentucky roads were operated by the former as a continuous system, under one management (Rec., pp. 45, 46).

5. About 1884 the Virginia Company opened an office in Washington at the corner of Sixth street and Pennsylvania avenue, which office has ever since remained and is now at the same place (Rec., p. 24).

6. About the same time it began to run through trains between Washington and Louisville (Rec., p. 55).

7. Subsequently Collis P. Huntington became the president of the Virginia and controlled the Kentucky Company (Rec., pp. 41–46).

8. He formed great schemes as to railroad consolidation (Rec., pp. 41–46).

9. In pursuance of these schemes, and for purposes of his own, he got from the legislature of Connecticut the charter of the Connecticut Company (Rec., p. 74).

10. This charter, approved March 27, 1884, prohibited the Connecticut Company from doing business in the very State which gave it birth (Rec., p. 42).

11. This prohibition was not removed until April 27, 1887, after the said Laura P. Howard had been injured (Rec., p. 42).

12. This Connecticut Company never built or owned a foot of track or an article of equipment anywhere (Rec. pp. 25, 26).

13. On January 29, 1886, the Connecticut Company, by Huntington, as its president, assumed to lease from the Kentucky Company all its rights and properties for a period

of 250 years from February 1, 1886, for the rental of $5,000 yearly (Rec., pp. 32–36).

14. On June 15, 1886, the Connecticut Company, by Huntington, as its president, and the Virginia Company, by the same Huntington, as its president, executed a similar lease from the Virginia to the Connecticut Company of all its rights and properties for a period of 250 years from July 11, 1886, at the same annual rental of $5,000 (Rec., pp. 36–41). The identity of these two sums, the railroads themselves having different mileage, etc., is significant.

15. These leases both contained provisions that the lessors should *keep up* their respective corporate organizations, and part of the rent should go to that purpose. (Rec. pp. 33, 37).

16. The officers and offices of the company or companies remained the same. (Rec., pp. 24, 41, 54, 58).

In the principal brief for defendant in error, while the statements of the witnesses Wickham and others have been fully considered, sufficient attention has not been called to the significance of the testimony of the witness Fuller (Rec., p. 58) as to the unchanged *personnel* of the Virginia, Kentucky and Connecticut companies' employees; again as to the entire absence of any change from December 31, 1885, (when it is claimed that the Virginia Company ceased operating the Kentucky Company's road) to January 1, 1886, when it is claimed the Connecticut began such operation (Rec., pp. 64, 65); also as to why the Kentucky road was constructed (Rec., p. 63); also as to the Virginia Company's operation of the Kentucky road after 1882 (Rec., pp. 57, 58, 60, 63, 64). The court is respectfully requested to carefully consider all of this testimony.

Especial attention is also asked for the testimony of the defendants' witness and attorney, F. B. Enslow (Rec., pp. 69, 70). He says, as to the change which is claimed to have occurred in January, 1886, as follows (Rec., p. 70):

> "The actual operating force of the road—the men engaged in the transportation, engineering, clerical,

and law departments—remained about the same, although there were some changes being made all the time.

Q. As to all these matters with respect to these three corporations, viz., the C. & O. Railway Company, the N. N. & M. V. Co., and the E., L. & B. S. Co., in respect to their termini and the relations they bore to each other in 1886 and prior thereto, would not Mr. Wickham be the person best qualified to give information? A. He would undoubtedly be better qualified than I would be.

Q. What road or company operated the line of road between Huntington, West Virginia, and Lexington, Kentucky, that is now operated by the Chesapeake and Ohio, in 1886? A. Am not certain when the Newport News and Mississippi Valley Company commenced the operation of the road from Huntington to Lexington, but my memory is that it was in the early part of January, 1886, until some time, I believe, in 1892.

Q. Immediately previous to January, 1886, what road or company operated the road between these points? A. I can't say as to that. Our salary prior to the year 1886 and all expenses were charged to the Chesapeake and Ohio Railroad Company and were paid to us through the then chief attorney of the Chesapeake and Ohio Railway Company at Charleston.

Q. Is the Newport News and Mississippi Valley Company in existence now? A. I am not informed as to whether it has kept up its corporate existence or not."

17. The equipment of the Connecticut Company was derived from the lessors. (Rec., p. 25).

18. The Virginia Company continued to be held out to the public as a through carrier between the two cities.

See advertisements in Washington Post at page 20 of Record.

Also advertisements in Louisville Courier-Journal at pages 20, 21 of Record.

Also map between pages 44 and 45 of Record on which road from Lexington, Kentucky, to Fortress Monroe, Virginia, is marked "*Chesapeake & Ohio Ry.;*" see also schedules and time tables on reverse of this map under the heading of Chesapeake and Ohio Railway.

19. These advertisements were inserted because, as Mr. Wickham says, "It" (the Virginia Company) "was a well-known line, and was being advertised and pressed for all it was worth." (Rec., p. 45).

Mr. Fuller says:

> "For the reason that the Newport News and Mississippi Valley road was something that the public did not know anything about for years, whereas the Chesapeake and Ohio Railway had been there for fifty or sixty years, and the general public knew where the White Sulphur Springs was and all those other places, and we just simply let it go along' (Rec., p. 56).

Again he says:

> "We always used 'Chesapeake and Ohio Railway.' It is simply a trademark. We might as well advertise the P. D. Q. route as the Newport News and Mississippi Valley Company. *The public would not know where it was located or how to get there*" (Rec., p. 24).

20. These leases provided that the Connecticut Company should pay all damages for injuries inflicted on persons or property from the operation of the leased roads, also all running expenses and interest on the bonded debt of the lessors (Rec., pp. 32–36, 36–41).

21. Despite the fact that Huntington had these leases made in 1886, we find him taking the following action in a little more than a year. On October 27, 1887, he gets judgment in a Virginia court against the Virginia Company for $1,756,034.16. On this same day he files also in a Virginia court, his bill in equity against the Virginia and

Connecticut Companies, alleging the insolvency of the Virginia Company and the refusal of the Connecticut Company to pay his demands against the Virginia Company.

Again on this same day the Virginia and Connecticut companies waive process, file their answers to the bill, consent to an immediate hearing of the cause, and a decree is entered appointing a receiver (Rec., pp. 77–84.)

22. Thereupon the Connecticut Company at once surrendered to the receiver its unexpired term of nearly 249 years, the equipment of the Virginia Company, and disappears from the scene and apparently from existence (Rec., pp. 25, 26, 59, 60). Thus we have here all the evidences of a collusive suit.

Walters *vs.* Mortgage and Trust Co., 50 F. R. 316.

23. The employees of the Connecticut Company generally became the employees of the receiver (Rec., pp. 57, 58).

24. Next the Virginia Company came out of the hands of the receiver and resumed operations with the same equipment, officers and offices (Rec., pp. 58, 59).

25. During this time tickets of the Virginia Company were good on this road (Rec., p. 19).

26. During this same time the names of these roads were changed so often that a ticket seller could not "keep track of them" (Rec., p. 19).

27. The employees of the road were paid during this time in the same way. "*The pay-car came around; the same system and the same people.* Mr. Patterson was the paymaster" (Rec., p. 69); so says an employee.

28. Another employee said voluntarily that, as he believed, the Kentucky road was operated at this time by the Virginia Company. Cautioned by counsel, he adds, "I am not clear as to which" (Rec., p. 15).

29. Mr. Frank Trigg, at this office on Sixth street and Pennsylvania avenue, responded to inquiries as to the Vir-

ginia Company in connection with this same accident (Rec., p. 14).

30. He went to see Mrs. Howard about this accident (Rec., p. 12).

31. Dr. Brock said, at the time of this accident, to Mrs. Howard and to others, that he was surgeon-in-chief of the Virginia Company (Rec., pp. 12, 16).

32. Dr. Brock came to see Mrs. Howard concerning this accident and paid her $200 (Rec., p. 12).

33. Mr. Tweed wrote as counsel for the Virginia Company to Mrs. Howard's then counsel to have permission for an examination by Dr. Clymer (Rec., p. 47).

34. Dr. Clymer understood that in making this examination he was acting for the Virginia Company (Rec., p. 48). See especially his report (Rec., p. 49).

35. The release signed by Mrs. Howard admitted that the Connecticut Company's lessors might be liable for the accident (Rec., p. 65).

(*Note that this release purports to be a receipt for a bill which the circumstances show that Mrs. Howard could not have rendered*).

36. The Connecticut Company was organized, Mr. Fuller says, "for the purpose of leasing railroads and forming a combination" (Rec., p. 26).

37. A careful reading of the leases from the Virginia and Kentucky Companies to the Connecticut Company will confirm the tendency of the other evidence to the effect that they were never intended as veritable leases (Rec., pp. 32–41).

XI.

The Connecticut legislature which in 1884 created the Connecticut Company in the very act of creation stamped fraud upon it.

> Land Grant Railway & Trust Co. *vs.* Commissioners of Coffey County, 6 Kansas, 245.

Legislation had in 1887, after the accident, could not legitimize the spurious issue so as to affect intervening rights.

XII.

Upon the foregoing facts the question was a simple one: was or was not the Connecticut Company *in November, 1886*, when this accident happened, a veritable and legal corporation and also a veritable and legal lessee of the Virginia and Kentucky Companies?

This question was peculiarly one for the jury.

Sonnentheil *vs.* Brewing Co., 172 U. S. 401.

XIII.

The authority sought to be derived from general provisions of the laws of the State of West Virginia, by *ex parte* and perfunctory action there, will be carefully scrutinized.

Oregon Railway Co. *vs.* Oregonian Rwy. Co. 130 U. S. 26, 27.

In any event these provisions do not cover the Connecticut Company's case, as it did not come within the words of the law. *Ibidem.* At the time it filed these papers in West Virginia it could not lease or operate a railroad anywhere.

XIV.

The subsequent legislation of the State of Virginia cannot affect the plaintiff's vested right.

Webster *vs.* Cooper, 14 Howard, 488, 501.

Cook *vs.* Tullis, 18 Wall. 332, 338.

Pickering *vs.* Lomax, 145 U. S. 310, 315.

Morley *vs.* Lake Shore Railway Co. 146 U. S. 162, 168.

XV.

The Virginia ratifying act especially provided that it should take effect *from the date of its passage* (May 14, 1887) (Rec., p. 76).

It could not relate back to November, 1886, so as to disturb plaintiffs' vested right.

23 Am. & Eng. Ency. of Law, p. 448, and cases cited in note 4.

Ibid, p. 452, and cases cited in note 5.

XVI.

The decisions cited from the courts of Virginia, West Virginia and Kentucky were not made in any case in which the question here involved was raised.

XVII.

The case of Ricketts *vs.* Chesapeake & Ohio RR. Co., 33 W. Va. 434, decided in 1890, concerned an incident that happened on the Virginia Company's road on December 21, 1885, on a train of the Kentucky Company. The court held the Virginia Company liable for an assault committed by the Kentucky Company's conductor on its passenger on its train. Of the two roads the court said (p. 435):

> "*These two roads, while existing under separate charters and organizations, were in fact operated as a continuous line of railroad from Newport News, in the State of Virginia, to Lexington, in the State of Kentucky.* . . ."

The court held the Virginia Company liable.

XVIII.

Individuals, who were not in fact partners, have yet been held such, so far as the public is concerned, by reason of such circumstances and conduct as are here in evidence.

Sun Insurance Co. *vs.* Kountz Line, 122 U. S. 583.

XIX.

Nominal corporations can not be used as a mask behind which designing persons may with impunity work injury to the public.

Lehigh Mining and Manufacturing Co. *vs.* Kelly, 160 U. S. 327, 329.

Montgomery *vs.* Forbes, 148 Mass. 249.

XX.

So that, on the whole testimony, it was impossible for the trial justice to charge the jury, as a matter of law, that their verdict must be for the defendant.

XXI.

On the contrary, he would have been justified in charging them, as the Court of Appeals held, that the so-called leases were void as against the plaintiffs in November, 1886.

XXII.

But the plaintiff in error can not complain that he left the validity of these leases to the jury as a question of fact.

And he was compelled in any event to leave to the jury the question whether or not the Virginia Company operated the train on which Mrs. Howard was hurt.

XXIII.

The release executed by Mrs. Howard was of no validity under the then married woman's law of the District of Columbia.

Snashall *vs.* Railway Co., 19 D. C. 407, 411.

XXIV.

But, in any event, it was no injury to the plaintiff in error to leave to the jury the question as to whether or not it was obtained by fraud.

Union Pacific Rwy. Co. *vs.* Harris, 158 U. S. 331.
Luster *vs.* C. & N. W. RR. Co., 71 Wis. 391, 397.
C. R. I. & P. RR. Co. *vs.* Lewis, 109 Ill. 120, 131.

XXV.

A person sued on a deed can give in evidence under the general issue of *non est factum* such fraud as will render the deed void.

Brown *vs.* B. & O. RR. Co., 6 App. D. C. 237, 242.
Chitty on Pleading, pp. 424, 425, 428.

XXVI.

No objection was taken at the trial to the introduction of this evidence when it was offered. Had it been then taken Mrs. Howard could have amended her pleading and filed a special replication of fraud. Under the laws of the District amendments may be made at any time (R. S. U. S. Sec. 954). It comes too late in an appellate court.

XXVII.

A reference to the opinion of the Court of Appeals upon the first hearing of this case in that court will show that the testimony of Mrs. Howard, as to the circumstances under which she executed the release in question, was substantially the same at the second as at the third trial of this case (Brief of Counsel for defendant in error, p. 63).

XXVIII.

The tender of the return of the $200 paid at the time of

the release was made in due time; in fact, it was not necessary to make it at all, if it would have been a useless form.

Cheney *vs.* Libby, 134 U. S. 68, 81.
Smith *vs.* Holyoke, 112 Mass. 517.

XXIX.

Upon Mrs. Howard's testimony that she signed the instrument relying upon Dr. Brock's [latest] representation that it was a receipt for $200, the tender was not necessary.

Mullen *vs.* Old Colony RR. Co., 127 Mass. 86, 89.
Bliss *vs.* N. Y. C. & H. R. RR. Co., 160 Mass. 447.
Dróhan *vs.* L. S., etc., RR. Co., 162 Mass. 435, 437.

XXX.

Mrs. Howard's case was proved at the second trial by the defendant's own witnesses (Brief for Defendant in Error, p. 82 containing opinion of Court of Appeals). On the third trial she was compelled to introduce this testimony (depositions) herself for fear that the railroad company would fail to offer it. But the case went to the jury as a whole. She was not concluded by the testimony of the defendant's witnesses on any given point. The question for the jury was to be answered by them upon the whole evidence and the conclusions which could be legitimately drawn from it.

XXXI.

Much of the brief of counsel for the plaintiff in error discusses with great ability questions with which we are not here concerned. No dissent need be made to much that he has said. It is simply irrelevant.

We do not want to know what the Connecticut Company might have done had it been a valid corporation.

Our inquiry is: Was it a sham?

If it was a sham, who was operating the Kentucky Com-

pany's road in November, 1886, when Mrs. Howard was hurt?

The Supreme Court of West Virginia has said that in December, 1895, both the Virginia and Kentucky roads were operated as a continuous line of railroad from Newport News to Lexington.

The Record makes good that assertion.

No change at all occurred until after Mrs. Howard was hurt, if the Connecticut Company was a sham, or even a mere "holding" company.

In any event, who was operating the train on which Mrs. Howard was hurt?

XXXII.

Which company here mentioned has always been and still is in the forefront of railway communication between Washington and Louisville?

What has become of the Connecticut Company?—of the Kentucky Company?

Has not the Virginia Company always been, what it now is, the only publicly known and responsible manager and controller of that communication?

XXXIV.

Whom could Mrs. Howard sue? In this connection the the ideas of Mr. Wickham (Rec., p. 47) are instructive.

XXXV.

The contention of counsel for the plaintiff in error seems to be that the Virginia Company is not liable for the wrongs it did to the plaintiff, because it ought not to have operated the road and train of cars in question.

The doctrine of *ultra vires* has no application to torts in this jurisdiction.

National Bank *vs.* Graham, 100 U. S. 699, 702.
Salt Lake City *vs.* Hollister, 118 U. S. 256, 260.
D. & G. RR. Co. *vs.* Harris, 122 U. S. 597, 608.
Lake Shore, &c., RR. Co. *vs.* Prentice, 147 U. S. 101, 109.

XXXVI.

It appears from the following case that the plaintiff in error was, apparently in 1887, pursuing elsewhere in Kentucky a similar line of conduct to that in question here.

Stickly *vs.* Chesapeake & Ohio Railroad Co., 93 Ky. 323:

> "The appellants, in the year 1887, owned a house and lot in the city of Maysville, located on Third and Poplar streets, and fronting on Third street. It is alleged in the petition that during the period these appellants owned the property, the Maysville and Big Sandy Railroad Co. constructed a double track railroad on Third street, within six feet of the line of their lot and to the edge of a narrow sidewalk in front of it. *That after the construction of the road and while the appellants owned the property, the Chesapeake and Ohio Railroad Co. took possession of the road under some arrangement with the Big Sandy Railroad Co., the the terms of which are unknown to plaintiffs, and have since been operating the road and now have the exclusive control of it.*"

Held: If the company which constructed the road transfers it by lien or sale to another, the original company and its lessee or vendee are jointly liable to the owner for the damages sustained. When, however, the injury resulted from the careless operation of the road, the risk is different, and the company operating the road at the time the injury was sustained is alone liable.

XXXVII.

The case of Latham *vs* Boston, Hoosac Tunnel and Western RR. Co., 38 Hun. 265, is instructive. In 1881 the defendant corporation in that case attempted to consolidate

with other companies and form a new corporation. In 1883 it was decided by the court that the attempt to form the new corporation was ineffectual; that the defendant had never ceased to exist as a corporation, and that it should be treated as a valid existing corporate entity; that the defendant was liable for the damages sustained by the plaintiff by reason of an injury to his eye, occasioned by the negligence of the persons operating the road under the attempted consolidation.

See, also, the case of P. W. & B. RR. Co. *vs.* The State of Maryland, 58 Md. 372.

XXXVIII.

The case of Thomas *vs.* Railroad Company, 101 U. S. 71, cited by counsel for the plaintiff in error, has an important bearing upon the principle that mere legislative or judicial recognition of an existing condition can not be construed as an affirmance of its validity.

See especially page 85 of the Opinion.

XXXIX.

The case of Oregon Rwy. Co. *vs.* Oregonian Rwy. Co. 130 U. S. 1, also cited by counsel for the plaintiff in error, is instructive in its reference to "*foreign corporations created for the purpose of leasing,*" as was the Connecticut corporation.

See pages 36 and 37 of the Opinion.

XL.

The case of Pennsylvania Railroad Co. *vs.* Jones, 155 U. S. 333, has been summarized by Mr. Justice Harlan, in his dissenting opinion in the case of St. Louis and San Francisco Rwy. *vs.* James, 161 U. S. 545, 570–571. In that case the other railroads than the Pennsylvania were held upon less evidence than that which here tends to hold the Virginia Company. A reading of the summary will suffice to show this.

It must be borne in mind that in the Jones case the person injured did not have a Pennsylvania railroad ticket, was not upon a train of that company, and was not upon the road of that company.

Mrs. Howard had a Chesapeake and Ohio ticket; and there was evidence tending to show that she was hurt on a train of that company, and on a road actually operated by that company.

There is no question that from 1882 to 1886 the Virginia Company operated the Kentucky Company's road, collecting money and apportioning it between the two companies.

Wickham, Rec., p. 45.
Fuller, Rec., pp. 57, 63, 64.

In 1886 no change was made.

Fuller, Rec., pp. 64, 65.

Enslow says: No substantial change.

Rec., pp. 69, 70.

XLI.

The case of Union Pacific Rwy. Co. *vs.* Chicago, &c., Rwy. Co., 163 U. S. 564, cited by counsel for the plaintiff in error, is altogether in favor of the contentions of the defendant in error on the main point in controversy here.

Mr. Chief Justice Fuller says (p. 590):

> "It will not do to hold this contract void and allow defendant to escape from the obligations it assumed on the mere suggestion that at some time in the remote future there is a possibility that the suggested contingency might arise."

And again, quoting Mr. Justice Brewer (Rec., p. 604):

> "It is to the higher interest of all, corporations and public alike, that it be understood that there is a binding force in all contract obligations; that no change of interest or change of management can

ADDENDA.

As to the words "*Newport News and Mississippi Valley Co.*," said by the defendants' witness Castle (Rec., p. 72) to have been on the train in question, the jury may have hesitated to believe this witness, who in December, 1896, first testified as to what he had no particular occasion to notice at midnight in November, 1886, rather than the defendants' other witness, Paul, the conductor of the said train, who testified (Rec., p. 72) that the derailed car was "*a Piedmont Air Line car.*" There can be no question that Mrs. Howard was in a Pullman car.

Add to XII–37, p. 11 of Supplemental Brief.

It appears from pages 74 and 75 of the Record that this Connecticut Company had a nominal capital of only $500,000 of which only $50,000 was paid in. *Could it seriously propose with this financial equipment to operate the Virginia and Kentucky and other roads spoken of by the witness Wickham?*

> dispute their sanctity or break their force; but that the law which gives to corporations their rights, their capacities for large accumulations, and all their faculties, is potent to hold them to all their obligations, and to make right and justice the measure of all corporate as well as individual action."

If this be true of contracts, it must be true of torts.

Counsel for the defendant in error referred, at page 42 of their principal brief, to a monographic note at page 737, Vol. 44 of the Lawyers' Reports Annotated.

This note is added to this supplemental brief as an appendix, for more convenient reference by the court.

Its reading will show the trend of judicial decision in the direction of holding all railroad companies, in anywise concerned in the commission of a tort, to responsibility for it. Such parties may be the following: The original holder of the charter—the lessor; the lessee of the road—who operates it; the licensee—running a train over the road and doing the injury.

Public policy would seem to require that the lessor, as owning the roadbed and equipment, and therefore presumably able to respond in damages, should be held.

The lessee too often has no property of any kind save a worthless charter.

The licensee may be in the same situation.

But in any event the company running the road will be held.

Respectfully submitted.

R. ROSS PERRY.
JAMES FRANCIS SMITH.
R. ROSS PERRY, JR.

APPENDIX.

NOTE.—*Liability of lessor of railroad for injuries caused by negligence of another company using the road under a lease, license, or other contract.*

I. *General principles as to.*
II. *Under railway leases.*
  a. *The general rule.*
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I. *General principles as to.*

The grant of a franchise giving the right to build, own, and operate a railway carries with it the duty to so use the property and manage and control the railroad as to do no unnecessary damage to the person or property of others, and where injury results from the negligent or unlawful operation of the railroad, whether by the corporation to which the franchise was granted, or by another corporation, or by individuals whom the owner authorizes or permits to use its tracks, the company owning the railroad and franchise will be liable. Pennsylvania Co. v. Ellett, 132 Ill. 654.

And when injury results from the negligent or unlawful

operation of a railroad, whether by the corporation to which the franchise is granted, or by another corporation, or other corporations which the proprietary company authorizes or permits to use its tracks, the company owning the railroad tracks and franchises is liable therefor as well as the one by which the damage was done. Chicago & E. R. Co. v. Meech, 163 Ill. 305.

The public may look for indemnity for injury resulting from the wrongful or unlawful operation of the railroad to the corporation to which it granted the franchise, thus delegating a portion of the public service to it, and for this purpose the company whom it permits to use its tracks, and its servants and employees will be regarded as the servants and agents of the owner company. Pennsylvania Co. v. Ellett, 132 Ill. 654.

A railroad company is a quasi-public corporation which cannot by its own voluntary contract or collusion surrender its functions and responsibilities to agents or trustees of its own selection—especially if they live outside the state and beyond the reach of its process. Naglee v. Alexandria & F. R. Co. 83 Va. 707.

And a railroad company has no power to relieve itself from liability arising under the laws of the state made for the purpose of compelling railroad companies to discharge their duties to the public faithfully and impartially by placing its road under the management and control of other persons. Woodhouse v. Rio Grande R. Co. 67 Tex. 416.

And the fact that a locomotive and cars by which an injury is done through negligence are being operated at the time by third persons under a contract with the owner of the road, does not release it from liability therefor. Illinois C. R. Co. v. Finnigan, 21 Ill. 646.

A railroad company cannot absolve itself from the performance of duties imposed upon it by law, or relieve itself from liability for the wrongful acts or omission of duty of persons operating its road, by transferring its corporate powers to them or permitting them to operate its road as owners of its capital stock. Chollette v. Omaha & R. Valley R. Co. 26 Neb. 159, 4 L. R. A. 135.

And railroad companies cannot, by means of any contract for the operation of their lines of transportation or the management and control of their tracks and right of way, relieve themselves from liability for violations of contracts or

the public law, or for torts committed by their lessees or the parties with whom they specially contract. Cogswell v. West Street & N. E. Electric R. Co. 5 Wash. 46; Palmer v. Utah & N. R. Co. 2 Idaho, 350.

Every railroad company is liable for the acts of all persons to whom it confides the mangement and control of its road as fully as though operated under the immediate control of the agencies provided by its charter. International & G. N. R. Co. v. Moody, 71 Tex. 614; Woodhouse v. Rio Grande R. Co. 67 Tex. 416.

Where a railroad company permits other companies or persons to exercise the franchise of running cars drawn by steam over its road, the company owning the road to which the law has intrusted the franchise is liable for any injury done as though the company owning the road were itself running the cars. Macon & A. R. Co. v. Mayes, 49 Ga. 355, 15 Am. Rep. 678.

The reason for holding a railroad company responsible for the performance of all the duties and obligations imposed upon it by its charter or the general laws of the state while it is being operated by another does not rest upon the narrow ground alone that the latter is in the exercise of a franchise which belongs to the former, and in so acting is to be held as the servant or agent of the owner corporation, but is also based upon the grant of its charter, in consideration of which the corporation undertakes the performance of duties and obligations toward the public, and it is a matter of public policy that it should not be relieved from their performance without the consent of the legislature. Balsley v. St. Louis, A. & T. H. R. Co. 119 Ill. 68, 59 Am. Rep. 784.

II. *Under railway leases.*

a. *The general rule.*

A railroad company receives its charter from the state, conferring certain franchises, rights and privileges upon consideration that it will perform the duties and fulfil the obligations which it at the same time incurs, and the fact that it chooses to perform such duties and fufil such obligations through another as lessee or otherwise cannot release it from the obligations assumed by the acceptance of its charter. National Bank v. Atlanta & C. Air Line R. Co. 25 S. C. 216.

And a railway corporation cannot escape the performance of any duty or obligation imposed upon it by its charter or the general laws of the state by a voluntary surrender of its road into the hands of lessees. Harmon v. Columbia & G. R. Co. 28 S. C. 401; National Bank v. Atlanta C. Air Line R. Co. 25 S. C. 216; Chicago & R. I. R. Co. v. Whipple, 22 Ill. 105; Ohio & M. R. Co. v. Dunbar, 20 Ill. 623, 71 Am. Dec. 291; Atty. Gen. v. Erie & K. R. Co. 55 Mich. 15; McCoy v. Kansas City, St. J. & C. B. R. Co. 36 Mo. App. 445; Delaware, L. & W. R. Co. v. Salmon, 39 N. J. L. 299, 23 Am. Rep. 214; East Line & R. River R. Co. v. Lee, 71 Tex. 538; International & G. N. R. Co. v. Kuehn, 70 Tex. 582; Galveston, H. & S. A. R. Co. v. Daniels, 9 Tex. Civ. App. 253; Cogswell v. West Street & N. E. Electric R. Co. 5 Wash. 46; Washington, A. & G. R. Co. v. Brown, 17 Wall. 445, 21 L. ed. 675.

And the rule is the same whether the liability claimed was *ex delicto* or *ex contractu*. National Bank v. Atlanta & C. Air Line R. Co. 25 S. C. 216.

The operation of a railroad by a lessee does not change the relations of the original company to the public. A. Backus Jr. & Sons v. Detroit W. Transit & Junction R. Co. 71 Mich. 645.

And a railroad company leasing its road is liable to a third person for an injury caused him by the negligence of the lessee in the operation of the road. Benton v. North Carolina R. Co. 122 N. C. 1007; Kinney v. North Carolina R. Co. 122 N. C. 961; Denver M. & A. R. Co. v. Cowgill, 44 Kan. 325; Price v. Barnard, 65 Mo. App. 649; Southern R. Co. v. Bouknight, 25 U. S. App. 415, 70 Fed. Rep. 442, 17 C. C. A. 181, 30 L. R. A. 823.

And this is so especially where the power to lease is not expressly given. Ohio & M. R. Co. v. Dunbar, 20 Ill. 623, 71 Am. Dec. 291.

A railroad company which under the lease of another road is conducting it wholly in the interests of the lessor occupies the position merely of operating agent, rendering the lessor liable for injuries from the negligence of the lessee. Southern R. Co. v. Bouknight, 25 U. S. App. 415, 70 Fed. Rep. 442, 17 C. C. A. 181, 30 L. R. A. 823.

And a railroad company chartered by the state cannot without legislative authority by lease or any other contract or arrangement turn over to another company its

road and the use of its franchises, and thereby exempt itself from responsibility for the conduct and management of the road, or evade any duty it may owe the general public. Fisher v. West Virginia & P. R. Co. 39 W. Va. 366, 23 L. R. A. 758; Ricketts v. Chesapeake & O. R. Co. 33 W. Va. 433, 7 L. R. A. 354; Rome & D. R. Co. v. Chasteen, 88 Ala. 591; Coggin v. Central R. Co. 62 Ga. 685; Nugent v. Boston, C. & M. R. Co. 80 Me. 62; Quested v. Newburyport & A. Horse R. Co. 127 Mass. 204; Freeman v. Minneapolis & St. L. R. Co. 28 Minn. 443; Lakin v. Willamette Valley & C. R. Co. 13 Or. 436, 57 Am. Rep. 25; International & G. N. R. Co. v. Underwood, 67 Tex. 589; Central & M. R. Co. v. Morris, 68 Tex. 59; East Line & R. River R. Co. v. Rushing, 69 Tex. 308; International & G. N. R. Co. v. Eckford, 71 Tex. 274; International & G. N. R. Co. v. Moody, 71 Tex. 614; East Line & R. River R. Co. v. Culberson, 72 Tex. 375, 3 L. R. A. 567; Hayes v. Northern P. R. Co. 46 U. S. App. 41, 74 Fed. Rep. 279, 20 C. C. A. 52.

Where a railroad company leases its line without authority of law such lease is void, and it will continue liable for all the negligence of the lessee affecting the public, the latter being treated as operating the road as a mere agent of the lessor. Arrowsmith v. Nashville & D. R. Co. 57 Fed. Rep. 165; Heron v. St. Paul, M. & M. R. Co. 68 Minn. 542; Van Steuben v. Central R. Co. 178 Pa. 367, 34 L. R. A. 577; International & G. N. R. Co. v. Underwood, 67 Tex. 589; East Line & R. River Co. v. Culberson, 72 Tex. 375, 3 L. R. A. 567; Abbott v. Johnstown, G. & K. Horse R. Co. 80 N. Y. 27, 36 Am. Rep. 572.

And where one railroad leases its line to another, and the lease is not ratified by the state, which has not consented to the transfer of the franchise or relieved the owner from responsibility as such, the lease is only binding upon the parties as between themselves, but is of no effect as to a third person receiving personal injuries at the hands of a lessee, his rights being the same as if no such contract had been made or attempted. Van Dresser v. Oregon R. & Nav. Co. 48 Fed. Rep. 202.

The owner of a railroad by virtue of its charter assumes the obligation to perform certain duties for the public in carrying freight and passengers and in observing the statutory precautions for the protection of the public from danger in the operation of its railroad; and when by leasing

its road it unlawfully shifts to another company the burden of the discharge of its duties, any loss resulting to any member of the public from a failure by the lessee to discharge them may be made the basis of a claim for damages against the lessor company. Hukill v. Maysville & B. S. R. Co. 72 Fed. Rep. 745.

A railway company cannot by a lease without the consent of the state escape responsibility for the act of a lessee, and thus shift the burdens and responsibilities it took upon itself by accepting the charter at the hands of the state or by organizing under the general law. Brown v. Hannibal & St. J. R. Co. 27 Mo. App. 394. It cannot without special statutory authority alienate its franchises or property acquired under the right of eminent domain or essential to the performance of its duty to the public, so as to relieve itself from such duty, either by sale, mortgage or lease. Singleton v. Southwestern R. Co. 70 Ga. 464, 48 Am. Rep. 574.

And this is so even if it surrenders possession to the lessee; the lessee is liable for its negligent acts, but so also is the lessor to the same extent that a principal is liable for a trespass committed by an agent in the line of his employment. Von Steuben v. Central R. Co. 4 Pa. Dist. R. 153.

And where the road and rolling stock of a railway are owned by one company and leased to another without special authority from the state, both companies would be liable for an injury inflicted by an engine on animals running at large, the one because of its actual operation of the road, and the other because it could not without permission of the legislature transfer its franchise, even temporarily, so as to release itself from liability for the acts and defaults of the lessee. International & G. N. R. Co. v. Dunham, 68 Tex. 231.

A transfer by a railroad company of its line of road to another company is not a transfer of the legal ownership which will relieve it from liability for negligent acts of the transferee, where the instrument of transfer is in most of its provisions a lease, and there are no direct words indicating a transfer of ownership or tending to show that the owner expected to relieve itself from the duties and liabilities imposed by its franchise. Driscoll v. Norwich & W. R. Co. 65 Conn. 230.

Neither a steam nor a street railroad corporation can make a valid transfer by way of lease or otherwise of its

franchise or its railroad and the bulk of its property so as to relieve itself of the burdens imposed upon it by law or by its charter, without the consent of the state. Braslin v. Somerville Horse R. Co. 145 Mass. 64.

So, in Norton v. North Carolina R. Co. 122 N. C. 910, a recovery was allowed against the owner of a railroad for injuries received by the plaintiff through the negligence of the lessee thereof, but the case turned upon other grounds, and the question of the liability of the lessor for the negligence of the lessee was not discussed.

And in McCoy v. Kansas City, St. J. & C. B. R. Co. 36 Mo. App. 445, cases between individuals where such liability was held not to exist were distinguished upon the ground that they had no application to a railroad corporation which had received its charter from the state and by acceptance thereof had taken upon itself burdens and responsibilities which it cannot shift without the consent of the state.

So, it has been held that a railroad company can be held responsible in punitive damages for any malicious, oppressive, or reckless act of a lessee of the road resulting in injury to a third person, and the question whether the trainmen of the lessee were reckless, malicious, or oppressive is properly left to the jury. Hart v. Charlotte, C. & A. R. Co. 33 S. C. 427, 10 L. R. A. 794.

b. *Application to particular subjects.*

The duty of a railroad company to keep its road and switches on it in a safe and proper condition for use is of a public character, and is due to every person who is lawfully upon the road, and one which it cannot dispose of by leasing the road to another. Sawyer v. Rutland & B. R. Co. 27 Vt. 370.

And the owner of a railroad and the franchises thereof is liable for injury to a passenger on a train operated by a lessee, growing out of the fact that a switch was not properly constructed and maintained or was not properly locked or otherwise secured, whether this was the result of the neglect of the employees of the owner or those of the lessee of the road. Peoria & R. I. R. Co. v. Lane, 83 Ill. 448.

So, a railroad company leasing its road to another railroad company without legislative consent is liable for injuries to persons caused by negligent defects in its tracks at

a highway crossing, though the lessee company had entered upon the control and management of the road. Freeman v. Minneapolis & St. L. R. Co. 28 Minn. 443.

And a railroad company cannot exonerate itself from liability for an assault committed on a passenger on its road by a trainman by proving that the portion of the road on which the assault occurred had been leased to and was being operated by another corporation. Ricketts v. Chesapeake & O. R. Co. 33 W. Va. 433, 7 L. R. A. 354.

So, a railroad company chartered by the state does not by leasing its road to another company relieve itself from liability for an injury to a passenger caused by a failure to provide sufficient coaches to receive and accommodate passengers. Bouknight v. Charlotte, C. & A. R. Co. 41 S. C. 415.

And it cannot escape liability to one who was injured from failure to provide sufficient coaches to accommodate passengers, upon the ground that the injury occurred beyond its line, where it had leased its line, and though the place where the injury occurred was beyond the line owned by it previous to such leasing it had had the privilege of going over that place from the proper authorities, and its lessee had continued to exercise that privilege without break. *Ibid.*

And a railroad company cannot lease its corporate property and franchises so as to be relieved from liability for damages to a shipment of hogs due to overcrowding, while the road was being run by the lessee. Ohio & M. R. Co. v. Dunbar, 20 Ill. 623, 71 Am. Dec. 291.

So, where cotton is received and receipted for by the agents of a lessor railroad operated by a lessee, the contract will be regarded as having been made directly with the lessor, and it will be held liable for failure to deliver goods thereunder, though the road is operated at the time by the lessee. National Bank v. Atlanta & C. Air Line R. Co. 25 S. C. 216.

And a railroad company owning a railroad and having the profit of the franchise may be held primarily responsible for loss by fire originating from a locomotive running on such road with its consent in the transaction of business for the accommodation of which its franchise was procured, though it had leased its franchise. Ingersoll v. Stockbridge & P. R. Co. 8 Allen, 438.

And the fact that a railroad company has leased a part of its road to another company, which is a corporation of another state whose road connects with it, does not relieve the former company from liability for the loss of goods delivered to it to be carried over its road, occurring upon the part leased. Langley v. Boston & M. R. Co. 10 Gray, 103.

So, a depot company cannot so lease or transfer its interest under its franchise as to rid itself of liability to a person injured from its improper use. A. Backus Jr. & Sons v. Detroit W. Transit & Junction R. Co. 71 Mich. 645.

And the lessor of a railroad cannot escape liability for an injury caused in its operation by the lessee upon the theory that its tracks are upon its private grounds and for its own convenience, and that the same rule must be applied as would apply to the track of a private individual extending into his lumber yard, or the like, where it was authorized by law to acquire land for right of way by purchase and condemnation and to make connections with other railroads, and it was clothed with ample power to control its management and operation, whether by itself or others. Pennsylvania Co. v. Ellett, 132 Ill. 654.

So, the owner of a railroad which has leased the same is not relieved from liability for injuries done thereon by the transfer of possession thereof to a receiver by a decree of a court of competent jurisdiction, unless the possession of the receiver is exclusive and the servants of the road are wholly employed and controlled by him. Washington, A. & G. R. Co. v. Brown, 17 Wall. 445, 21 L. ed. 675.

And a railroad company cannot escape liability for the negligent injury to property committed by trains on its line on the ground that it had leased its railroad to another company, which latter company had under an order of the United States circuit court been put into the hands of receivers who were operating such road at the time of such injury. Parr v. Spartanburg, U. & C. R. Co. 43 S. C. 197.

So, a railroad company subject to the provisions of the act to regulate commerce cannot, by leasing its road, free itself from liability for practices made illegal by that statute. Independent Refiners' Asso. v. Western N. Y. & P. R. Co. 6 Inters. Com. Rep. 378.

And a corporation of one state whose stock is owned by a corporation of another state, by which the road is managed, and which appoints the officers and agents and furnishes

the rolling stock, the directors of the former company being selected by the latter company and qualified by a transfer of one or more shares of stock to them before an election, which they return on vacating their office, and which makes annual statements to the legislature, in which its gross receipts for the year are nominally divided among the companies, is liable for the infringement of a patent right respecting the cars used thereon. New York & M. Line R. Co. v. Winans, 17 How. 31, 15 L. ed. 27.

c. *Authority to lease; construction.*

Authority to lease is conferred by statute in most of the states. These statutes generally confer power in plain and direct terms, and have consequently given rise to but little judicial construction. It would seem, however, that the power must be clearly and plainly conferred, and that statutes conferring it are to be strictly construed.

Thus, where the power to sell or lease is not expressly conferred upon a railway corporation, it will not arise from implication so as to relieve it from liability for torts of a lessee. Arrowsmith v. Nashville & D. R. Co. 57 Fed Rep. 165.

In the above case Washington, A. & G. R. Co. v. Brown, 17 Wall. 446, 21 L. ed. 675, *supra*, II. b, was distinguished upon the ground that it did not appear in that case that the lease had been made by authority of law, and it appeared that the road was operated by one of the owners in its name, and that the person injured held a ticket of the lessor company, and the question of the effect of legislative authority to make a lease upon the liability of the lessor was not discussed.

So, the ordinary clause in a railway charter authorizing state corporations to contract with other transportation companies for the mutual transfer of goods and passengers over each other's road confers no authority to a railroad to lease its road and franchises. Thomas v. West Jersey R. Co. 101 U. S. 71, 25 L. ed. 950.

And act of Congress of July 4, 1884, giving a railroad company the right to build its road through the lands of the Indian Nations upon condition that it bind itself, its successors and assigns, to refrain from certain acts, that being the only mention made of the word "assigns," does

not give authority to lease its road. Briscoe v. Southern Kansas R. Co. 40 Fed Rep. 273.

And Texas Const. art. 10, section 5, providing that no railroad corporation or the lessees of such corporation shall consolidate with any other having a parallel or competing line, is restrictive upon the power of such corporations, and cannot be construed as a grant of authority to lease so as to release the lessor of a railroad from liability for failure to perform its charter obligations. Central & M. R. Co. v. Morris, 68 Tex. 59.

And New York act of 1864, requiring a lessee to perform certain acts, and specifying, among other lessees, other railroad companies and person or persons, does not confer power to lease a railroad to a person or individual, but is applicable only when such power has been obtained. Abbott v. Johnstown, G. & K. Horse R. Co. 80 N. Y. 27, 36 Am. Rep. 572.

So, a statute providing for the leasing of continuous lines refers to corporations of the state unless an express intent appears that it shall be applied to other corporations. Van Steuben v. Central R. Co. 178 Pa. 367, 34 L. R. A. 577.

And the charter of a railroad and the laws of a state under which it exists, giving it power to lease its road, do not give it the right to exercise such power beyond the limits of the state. Briscoe v. Southern Kansas R. Co. 40 Fed. Rep. 273.

And Minn. Gen. Stat. 1878, chap. 34, section 69, providing that any railroad corporation may lease or purchase any part of any railroad constructed by any other corporation whose lines of road are continuous or connected with its own, the title to which is devoted to providing how corporations empowered to take private property for public use, and how railroad corporations may be incorporated, and to the regulation of such corporations, and defining their powers and duties, refers to corporations of the state, and does not authorize the leasing of a railroad in the state by a railroad company of another state. Freeman v. Minneapolis & St. L. R. Co. 28 Minn. 443.

And where a railroad company chartered by the state permits a foreign railroad corporation to operate a part of its road in the state under a verbal agreement, and the two railroads form a continuous line through and beyond the limits of the State, the domestic company will be liable for

injuries sustained on that portion of its road so operated by the foreign company. Ricketts v. Chesapeake & O. R. Co. 33 W. Va. 433, 7 L. R. A. 354.

And see also, on the subject of leasing to foreign corporations, Naglee v. Alexandria & F. R. Co. 83 Va. 707, *supra*, I., and Langley v. Boston & M. R. Co. 10 Gray, 103, *supra*, II, b.

So, the lease of a railroad will not be deemed to have been authorized by Pa. Acts 1861, P. L. 140, 1870, P. L. 31, authorizing such lease where the roads are connected either directly or by intervening lines forming a continuous route or routes for the transportation of persons and property, so as to relieve the lessor company from liability for the acts of the lessee, where nothing in the lease shows, and it is not plain, that the roads of the lessor and lessee were connected either directly or by an intervening line. Van Steuben v. Central R. Co. 178 Pa. 367, 34 L. R. A. 577.

This note is confined to the question of the liability of the lessor or licensor of a railroad for the wrongful acts of the lessee or licensee, and is not intended to include the question of the power to lease. The question of power is touched incidentally only, as bearing upon the question of liability, and as it appeared incidentally in liability cases.

d. *Effect of authority.*

1. *Conflict of opinion.*

The question whether the leasing of a railroad under a mere statutory authority to lease will relieve the lessor from liability for wrongs of the lessee in the operation of the road, or whether, in order to accomplish that object, it is also necessary that the statute should contain an express exemption from liability, has given rise to much conflict of judicial opinion. The more general rule, however, would seem to be that bare authority to lease would be sufficient to release from liability for wrongs of the lessee in the operation of the road, but not for such as arose from defects in the original construction. But the rule that a special statutory exemption is necessary is ably supported and tenaciously adhered to.

2. *Rule requiring special statutory exemptions.*

The rule adopted by some of the states, among which are

North Carolina, South Carolina, Ohio, and Nebraska, is that however many leases or subleases of a railroad may have been made, the law attaches to the actual exercise of the privilege of carrying passengers and freight the compensatory obligation to the public to use ordinary care for the safety of both the persons and property so transferred. But the carrier who simply substitutes, with the consent of the state, another in his place, cannot establish his own right of exemption from responsibility for the wrongs of the substitute, unless he can show, not only explicit authority to lease the property, but also to rid himself of the responsibility. Logan v. North Carolina R. Co. 116 N. C. 940.

Under this rule legislative consent to the leasing of a railroad is not alone sufficient to release the owner from its obligations to the public, and will not, without more, release it from liability for the torts committed by the lessee. Singleton v. Southwestern R. Co. 70 Ga. 464, 48 Am. Rep. 574.

In the above case, Jones v. Georgia Southern R. Co. 66 Ga. 558, *infra*, VII., was distinguished upon the ground that the case at bar arose, not between the lessee company and one of its servants, but between the owner of the railroad operated by the lessee company in its name, and the public, in the exercise of one of its most important franchises—the transportation of passengers.

Exemption from liability on the part of a lessor of a railroad for damages for acts of the lessee is not necessarily implied from a lease made with legislative authority, giving the lessee the exclusive control and possession of the road. Heron v. St. Paul, M. & M. R. Co. 68 Minn. 542.

And a lease of a railroad, though duly authorized by law, will not release the railroad company from liability for a failure to discharge its charter obligations, unless the law giving the power to make the lease contains a provision to that effect. Central & M. R. Co. v. Morris, 68 Tex. 59.

And a railroad company cannot by leasing its property absolve itself from liability for an injury to a person caused by the negligence of the lessee in the operation of the road, unless such exemption is expressly authorized by legislative authority. Driscoll v. Norwich & W. R. Co. 65 Conn. 230.

The original obligation of a railroad company to the public cannot be discharged by a transfer of its franchises to another company except by legislative enactment, con-

senting to and authorizing such transfer and exempting it from liability, and mere legislative consent without release from the obligations to the public is not sufficient. Chollette v. Omaha & R. Valley R. Co. 26 Neb. 159, 4 L. R. A. 135.

So, the consent of the state that a railroad company might lease its road is not a consent to the surrender of any of the rights of the public in and to or connected with the charter of such railroad company, where it is not expressed in the law permitting the lease. Fisher v. Baltimore & O. & C. O. R. Cos. 3 Ohio N. P. 283.

And a charter of a railway company authorizing it to farm out or lease its road to another company, and the fact that a railroad has done so, do not exempt it from responsibility for negligent acts of the lessee by which cattle are killed, in the absence of any positive granting of such exemption. Harmon v. Columbia & G. R. Co. 28 S. C. 401.

And the lessor of a railroad cannot be said to have performed the public duty owed by it under its charter where it permits its lessee to use locomotive engines which are neither safe nor suitable for guarding against fire. Fisher v. Baltimore & O. & C. O. R. Cos. 3 Ohio N. P. 283.

And the liability of a railroad corporation for injuries by the wrongful acts of a lessee or other person done in the exercise by its permission of any of its franchises is not limited to wrongs done by them while in the performance of acts which they would have had no right to perform except under the charter of the company sought to be made liable. Balsley v. St. Louis, A. & T. R. Co. 119 Ill. 68, 59 Am. Rep. 784.

There is no distinction between the liability of a lessor of a railroad for an injury sustained by reason of some omission of duty resting upon the lessor—as, for example, for a defective condition of the track or of a bridge existing at the time of the lease—and an injury arising from negligence of the lessee's servants in running the trains. Harmon v. Columbia & G. R. Co. 28 S. C. 401.

So, the rule of liability has been arrived at through the construction placed upon the peculiar language of some of the statutes authorizing the lease in some of the cases.

Thus, Iowa Code, sections 1278, 1307, making lessees of railroads liable to the same extent as the corporation, merely supplies a cumulative remedy, and does not release the

owner of the road from liability for its operation. Bower v. Burlington & S. W. R. Co. 42 Iowa, 546.

And Iowa Code, section 1300, with reference to railroads, providing that any such corporation may sell or lease its railroad property and franchises or make joint running arrangements with any corporation owning or operating any connecting railroad, and the corporation operating the railway of another shall in all respects be liable in the same manner and to the same extent as though such railway belonged to it, does not discharge the lessor company from any of its corporate duties or liabilities, but simply imposes an additional liability upon the lessee while operating it. Chicago & N. W. R. Co. v. Crane, 113 U. S. 424, 28 L. ed. 1064.

And the effect of Mass. Stat. 1873, Chap. 49, providing that a railroad may lease its road and franchises and contract with any responsible parties for the operation of its road, but such lease or contract shall not release or exempt said company from any duties and liabilities or restrictions to which it would otherwise be subject, is that the railroad company has the same liability to persons injured in the operation and management of the road while the lease is in force which it would have had if the injury had been sustained while the company was itself managing its road. Quested v. Newburyport & A. Horse R. Co., 127 Mass. 204.

So, the owner of a railroad is liable, under Illinois railroad and warehouse act, section 38, providing that it shall be the duty of all railroad corporations to keep their right of way clear from dead grass, dry weeds, or other dangerous combustible material, imposing a penalty for violation thereof, for damage caused by fire communicated by the negligent act of the employees of a lessee of the road. Pittsburg C. & St. L. R. Co. v. Campbell, 86 Ill. 443.

And a railroad company which has leased its road to another company is liable under the state statute for the destruction of property by fire through the neglect of the lessee company to keep its right of way clear from dead grass, dried weeds, etc., though the legislature may have conferred upon the lessee company all the powers of the lessor, where there was no express exemption from liability. Balsley v. St. Louis, A. & T. H. R. Co. 119 Ill. 68, 59 Am. Rep. 784.

So, a railroad company which has leased its road is never-

theless liable, under Me. Rev. Stat. 1857, chap. 51, section 38, providing that when a building or other property is injured by fire communicated by an engine used upon its track by the lessee, the corporation using it is responsible for such injury, where the statute authorizing the lease expressly provides that nothing in such lease shall exonerate the lessor from any duty or liability imposed by its charter, or any general law of the state. Bean v. Atlantic & St. L. R. Co. 63 Me. 293.

And under Me. Stat. 1853, chap. 150, section 1, authorizing railroad companies to lease their roads, and providing that nothing contained in such act or any lease or contract entered into under it should exonerate the company or stockholders thereof from any duties or liabilities the owner of the road assumed by the acceptance of its charter or which were afterwards rightfully imposed upon it by the laws of the state, such duties were, at least for the purposes of a remedy, to remain and continue to be obligatory upon it in the same manner and to the same extent as if the lease had not been executed, and the possession and management transferred to lessees, and such liability is not restricted to such claims as arise from duties with relation to the structure of the road, or from neglect properly to construct and fence it, as distinguished from duties arising from its management and operation. Stearns v. Atlantic & St. L. R. Co. 46 Me. 95.

So, the facts that an act enabling a railroad corporation to lease its road calls for a responsible lessee, and that such lessee is liable for injuries caused by his negligent management, do not release the lessor from liability for injuries caused by the operation or management of the road during the life of the lease. Quested v. Newburyport & A. Horse R. Co. 127 Mass. 204.

And a street railway company empowered to construct a street railroad, and made liable for any loss or injury sustained from its carelessness or negligence in the management or construction of its road, which transfers a part thereof to another street railroad company under an agreement that the second company is to stand in the place of the first so far as the road is concerned, taking the lease subject to all the conditions, restrictions, duties, and liabilities imposed upon the owner, and agreeing to defend all suits against it, which lease and assignment are ratified and

confirmed and declared valid by statute, and all acts done thereunder declared legal, is not thereby exonerated from all responsibility to persons injured upon that part of the railroad which was leased, as such act, though a sanction to the contract, contains nothing by way of exoneration from the primary responsibility of the lessor. Braslin v. Somerville Horse R. Co. 145 Mass. 64.

So, a corporation chartered by Congress is a corporation of another state within the meaning of Mo. act March 24, 1870, providing that a corporation of that state leasing its road to a corporation of another state shall remain liable as if it operated the road itself. Smith v. Pacific R. Co. 61 Mo. 17.

But an action against a railroad company which had leased its road to a corporation of another state, for damages caused by the negligence of the employees of the lessee road, can only be maintained in Missouri under Rev. Stat. 1879, section 790, providing that the lessor company shall remain liable as if it operated the road itself, and in such case the negligence of the lessee company, and that the lessor company had leased its road to that company, must be alleged and proved. Main v. Hannibal & St. J. R. Co. 18 Mo. App. 388.

3. *Rule that general authority to lease is sufficient.*

Upon the other hand, the authorities of a greater number of the states have adopted the rule that where there is express authority for a particular railroad to lease all its franchises to another company, or where there is general statutory authority by which railroad corporations may lease to other roads, a railroad may execute such a lease, and if made without the reservation of any control over the operation of the road by the lessee, it is exempt from liability for torts committed by the lessee. Von Steuben v. Central R. Co. 4 Pa. Dist. R. 153; Briscoe v. Southern Kansas R. Co. 40 Fed. Rep. 273; and see Caruthers v. Kansas City, Ft. S. & M. R. Co., 59 Kansas, 629.

And that where one railroad company is authorized by law to contract or lease its road to another company, it is not responsible for the torts committed by the other company in the running of its trains or the management of the road. Lakin v. Willamette Valley & C. R. Co. 13 Or. 436, 57 Am. Rep. 25; Miller v. New York L. & W. R. Co. 125 N. Y. 118; Briscoe v. Southern Kansas R. Co. 40 Fed. Rep. 273.

But to absolve the lessor from liability the lease must be authorized by legislative authority. Briscoe v. Southern Kansas R. Co. 40 Fed. Rep. 273.

Under this rule, the lease of a railroad under due authority of law effects a transfer of rights and liabilities in its management, so that the corporation owning the railroad is discharged from responsibility for the lessee's torts. Missouri P. R. Co. v. Watts, 63 Tex. 549.

And where the state consents to the leasing of a railroad, the responsibility for the future management and operation of the road is exclusively imposed upon the lessee as the lawful substitute of the company owning the road, being liable for all its torts and contracts, though the lessor was not specially exempted. Arrowsmith v. Nashville & D. R. Co. 57 Fed. Rep. 165.

Thus, the owner of a railroad cannot be held liable for an injury to a brakeman on a train which is being operated by and under the control of another company under a contract giving it such management and control, where there is an express statute authorizing such agreement. Philips v. Northern R. Co. 62 Hun, 233.

A railroad company which has leased its road under due authority of law is not liable for injuries inflicted by the lessee company upon its own agents or servants in operating the road. Virginia Midland R. Co. v. Washington, 86 Va. 629, 7 L. R. A. 344.

And a contract between two railroad companies by which the railway of the one was leased to the other at a compensation of a certain per cent. of the gross receipts under which the road was to be operated, and was in its movements to be under the control of the lessee company alone, does not render the lessor liable for an injury to a third person in the operation of the road, the lessee only being liable. Philips v. Northern R. Co. 62 Hun, 233.

And where, under legislative authority, one railroad company leases its road to another granting the exclusive control and possession, and the lessee, also under legislative authority, grants to another company which owns and operates a road at the place in question, the right to run its trains over such road, retaining the possession and control of the road, the first lessor is not liable for damages caused by sparks and fire thrown by passing engines into combustible material which was negligently permitted to accumulate and

remain on the right of way. Heron v. St. Paul, M. & M. R. Co. 68 Minn. 542.

So, a railroad company is not responsible for the act of an engineer and fireman in running an engine which it has rented to a bridge company using it as a switch engine on a bridge used by several other railroad companies at a specified rental, besides the payment of the expenses of running it and the wages of the engineer and fireman, though they are carried on the pay-roll of the lessor railroad company. Nason v. Kansas City, Ft. S. & M. R. Co. 22 U. S. App. 220; Byrne v. Kansas City, Ft. S. & M. R. Co. 61 Fed. Rep. 605, 9 C. C. A. 666, 24 L. R. A. 693.

And a railroad company sued for failure to maintain proper cattle guards at designated points is entitled to defend on the ground that the road was in the hands of a lessee, though no pleading was filed by it. Denver, M. & A. R. Co. v. Cowgill, 44 Kan. 325.

And a contract between a domestic railroad corporation and a foreign railway corporation by which the foreign corporation was allowed to run its coal trains over the road of the domestic company, the domestic company to keep the tracks in order and furnish facilities for procuring water and fuel, is lawful under N. Y. Laws 1890, chap. 565, section 78, as amended by Laws 1893, chap. 434, providing that any railroad corporation or any corporation owning or operating a railroad within the state may contract with any other corporation for the use of their respective roads or routes, or any part thereof, and thereafter use the same in such manner and for such time as may be prescribed in such contract, and the lessor in such contract cannot be held liable for an injury inflicted upon a person by a train of the lessee company through the negligence of the persons in charge. Cain v. Syracuse, B. & N. Y. R. Co. 27 App. Div. 376.

In the above case, Abbott v. Johnstown, G. & K. Horse R. Co. 80 N. Y. 27, 36 Am. Rep. 572, *supra*, II. a, was distinguished upon the ground that the point upon which that case turned was that the statute did not expressly authorize the railroad corporation to lease its railroad to an individual, and that therefore the company was without excuse for the negligent use by its lessee of its corporate right and privileges.

So, the fact that a locomotive engine from which fire was

communicated to neighboring property was not among the specific property originally leased by the owner of the road to the lessee under whose operation the injury occurred does not relieve the owner from liability therefor. Stearns v. Atlantic & St. L. R. Co. 46 Me. 117.

But although a railroad company may lease its road to, and allow it to be operated by, another company, thereby making itself responsible for acts done upon the road which is leased, neither company loses its identity, and where the two operate a continuous line, any tort committed by the one or the other on a part belonging to the one or the other should be so alleged and proved—especially where both roads are constructed through territory of the same county. Central R. Co. v. Brinson, 64 Ga. 475.

4. *Necessity of entire control by lessee.*

A railroad company leasing its road and corporate franchises to another is exempt from liability for negligence in the operation of the road by the lessee if the lease was made under legislative authority and no control was reserved by the lessor, but, if the lessor continued even in partial control and management of its road, it would be liable. Sczi-wak v. Philadelphia & R. R. Co. 4 Pa. Dist. R. 339. And see Caruthers v. Kansas City, Ft. S. & M. R. Co., *supra*.

And a company owning a railroad upon which a personal injury is inflicted upon a passenger is not responsible therefor where another company has at the time the exclusive control and management of the road, and the locomotive by which the injury is done is being operated by the employees of the latter company. Harper v. Newport News & M. Valley R. Co. 90 Ky. 359.

But where the owner of a railroad leases the same, and the lessee surrenders all control and custody over the cars and engines, and commits them to the exclusive charge of the lessor, responsibility for a negligent injury to a third person by running a train of cars over a handcar on which he is riding will rest with the lessor and not with the lessee, notwithstanding that it owns the cars; but if the employees of both companies are engaged and co-operating in running the cars, and jointly controlling them, both the lessor and lessee will be liable. Nashville & C. R. Co. v. Carroll, 6 Heisk. 347.

So, a railroad company, existing under a charter making

railroad corporations liable for all damages sustained by any person in consequence of any neglect of any of their agents, and subjecting railroad corporations to liability for injuries occasioned by the negligence or carelessness of any person employed in conducting their trains, is not liable for an injury sustained by a passenger on a train on its road run by a lessee having the whole care, direction and control of the road at the time of the injury, where the injury was caused by the misconduct and positive wrong of the agents and servants of the lessee as distinguished from negligence or carelessness. Mahoney v. Atlantic & St. L. R. Co. 63 Me. 68.

In the above case, Whitney v. Atlantic & St. L. R. Co. 44 Me. 367, *infra*, IX., and Stearns v. Atlantic & St. L. R. Co. 46 Me. 117, *supra*, II. a, 2, were distinguished on the ground that the decisions in those cases were expressly placed upon the ground that the act of the legislature authorizing the lease did not exonerate the lessors from liabilities expressly imposed upon them by their charters or the statutes of the state.

And Langley v. Boston & M. R. Co. 10 Gray, 103, *supra*, II. b, was distinguished upon the ground that the lease in that case was executed without, while the lease in the present case was executed with, the saction of legislative authority, and that while in that case one party alone undertook to change the contract, in this one both parties assented to the change.

So, a company owning a railroad which gives to another company the right to construct a track on the side of its roadbed for the purpose of forming a connection between the roads of the two companies, such connecting track passing over a bridge previously constructed by the lessee company over which foot passengers had been permitted to pass, is not liable in damages to one who passed over such bridge at night and fell through the same between the rails of the connecting track by reason of an imperfect covering, where the defect was created solely by the licensee company in the construction of such connecting track, and it had the sole ownership, control, possession, and use thereof, though the licensor company had a reversionary interest. Gwathney v. Little Miami R. Co. 12 Ohio St. 92.

And the question whether an agreement between two railway companies by which one gives the other the right to lay its rails on the side of its roadbed, and to have the ex-

clusive use of the same for the purpose of making connection between the roads belonging to the two companies, placed the construction and use of the connecting track under the sole control of the licensee company so as to relieve the licensor company from responsibility of a nuisance thereon, and whether that company in fact created the nuisance and had the sole possession and use of that track, are to be ascertained by the jury from the evidence. *Ibid.*

But where two railroad companies operate trains on the same track, one being the owner and the other the lessee, the liability of each under Iowa Laws 1862, chap. 169, for stock injured by its own trains is not affected by the fact that by the terms of the lease the lessor had the right to fix the timetable, and that the lessee's trains were operated in subrogation thereto, and the lessor was obliged to keep up repairs. Clary v. Iowa Midland R. Co. 37 Iowa, 344.

As to control by lessee, see also Wabash R. Co. v. Williamson, 3 Ind. App. 190, *supra*, III.

5. *Limited to injuries in operation of road.*

Under this rule, the lessor of a railroad which it was authorized to lease and over the management of which it had no control cannot be made liable for injuries resulting to individuals from the negligent management or operation of the railroad as distinguished from duties absolutely imposed by law upon the owner. Hayes v. Northern P. R. Co. 46 U. S. App. 41, 74 Fed. Rep 279, 20 C. C. A. 52.

An authorized lease without any exemption clause absolves the lessor from torts of the lessee resulting from the negligent operation and handling of its trains and the general management of the leased road over which the lessor could have no control; but for an injury resulting from the negligent omission of some duty owed to the public, such as the proper construction of its road, station houses, etc., the charter company cannot, in the absence of statutory exemption, discharge itself from legal responsibility. Nugent v. Boston C. & M. R. Co. 80 Me. 62.

In the above case, Mahoney v. Atlantic & St. L. R. Co. 63 Me. 68, *supra*, II. d, 4, was distinguished upon the ground that there the injury complained of resulted solely from the wrongful act of the servant of the lessee who had sole con-

trol of the trains, and not, as here, from the wrong of the lessor in the original negligent construction of its depot.

A railroad company is not liable for the negligence of another company where the legislative authority to lease the road included by implication exemption from liability for negligence of the lessee operating the road, where it did not involve any breach of the public duties imposed upon the lessor by its charter or the general laws of the state. Heron v. St. Paul, M. & M. R. Co. 68 Minn. 542.

And a railroad company leasing its track to another company where the statute authorizes the lease is not responsible for injuries caused by torts of the lessee company if the injury resulted from negligence in the handling of trains or in the omission of any statutory duty connected with the management of the road, matters over which the lessor company could in the nature of things have no control, in such case the lessee being solely responsible; but where the injury results from the omission of some duty which the lessor itself owes to the public in the first instance, as something connected with the building of the road, the company assuming the franchises cannot devest itself of responsibility by leasing its track to another company though under legislative authority. St. Louis, W. & W. R. Co. v. Curl, 28 Kan. 622.

Thus, where one railroad company enters into an agreement with another, giving the latter the right to lay its rails on the sides of its roadbed, and to have the exclusive use of the same when laid for the purpose of making a connection with its road, the licensor or lessor company after having thus parted with the possession and control of its property for a lawful purpose cannot be made responsible for the improper manner in which the licensee or lessee company may have exercised its power of control over the premises, unless the contract contemplated, or its execution necessarily involved, the production of a nuisance. Gwathney v. Little Miami R. Co. 12 Ohio St. 92.

And a railroad company which has leased its road to another for a period of ninety-nine years, the road being managed and controlled exclusively by the latter, the former having entirely withdrawn from the operation of its business as a railroad company, is not liable for injuries sustained by a passenger on such road by reason of the wrongful and negligent acts of the lessee's servants. Fisher v. Metropolitan Elev. R. Co. 34 Hun, 433.

In the above case, Abbott v. Johnstown, G. & K. Horse R. Co. 80 N. Y. 27, 36 Am. Rep. 572, *supra*, II. a, was distinguished upon the ground that in that case the lease was made to an individual, and was therefore held to be inoperative, while by Chap. 218, Laws 1839, it was made lawful for any railroad corporation to lease to another railroad corporation.

And Washington, A. & G. R. Co. v. Brown, 17 Wall. 445, 21 L. ed. 675, *supra*, II. b, was distinguished upon the ground that there it appeared that the persons in charge of and operating the railroad were still, as a matter of fact, in part at least, in the service of the company.

But trustees under a railroad mortgage for the benefit of bondholders, who, after entering into possession thereunder, leased the railroad to others, but under verbal agreement continued to operate the road for the lessees, and received the earnings, paid the expenses, selected, contracted with, and discharged the persons employed on the road, and exercised all the other powers usually exercised by railroad companies over their own roads, are personally responsible for any injury sustained by reason of the negligence of a person so employed. Ballou v. Farnum, 9 Allen, 47.

And while, if a railroad company should lease its entire road or an entire portion of its road to another company it would cease under the Missouri statute to be liable as a common carrier as to the whole or such portion, it cannot parcel out its business to agents and be a common carrier without the liabilities thereof, as in such case the doctrine would apply that the responsibility of a franchise with exclusive privileges cannot be escaped by delegating to others the power to transact a portion of the business. Speed v. Atlantic & P. R. Co. 71 Mo. 303.

6. *Operation and charter duties distinguished.*

Trespasses committed by employees of the lessee railroad company while putting in a new culvert in the railroad, the owner or lessor having no connection with or authority over such men, cannot be regarded as having been committed within the exercise of any of its franchises, and it is not liable therefor. Chicago, M. & N. R. Co. v. Eichman, 47 Ill. App. 156.

And where parties hire the use of cars from a railroad company to be employed in transportation of freight to be laden as the hirers choose, the company does not incur any risk with reference to the mode adopted in loading them. Ohio & M. R. Co. v. Dunbar, 20 Ill. 623, 71 Am. Dec. 291.

And the killing of a conductor while endeavoring to make a coupling between the engine under his control and a train in its front, caused by a defect in the engine, is not a wrong for which an action may be maintained against the owner of the road, where the road was leased, and such conductor was in the employ of the lessee, and the engine was furnished by it. East Line & R. River R. Co. v. Culberson, 72 Tex. 375, 3 L. R. A. 567.

So, no duty rests upon a railroad company to keep in repair or well-lighted a passage to premises owned by it contiguous to its road, which are leased by it to be used as a railway eating house, such duty resting upon the lessee and not the lessor; and the lessor is not liable to a person injured by a failure to perform such duty. Texas & P. R. Co. v. Mangum, 68 Tex. 342.

And the lessor of a railroad cannot be made liable for damages for the neglience or torts of the lessee in constructing and maintaining an embankment on the road, where the lease was valid and the lessee was in possession, because it was bound, under the lease, to issue to the lessee its bonds for the cost of any work chargeable to construction, where the work was nevertheless the work of the lessee, and it did it in its own way, the lessor having no control. Miller v. New York, L. & W. R. Co. 125 N. Y. 118.

So an employee of a lessee of a railroad cannot hold the lessor thereof responsible for an injury received while coupling cars, due to the fact that a platform for the purpose of loading lumber had been permitted to be constructed, which was so near the railroad track that it did not permit of a man standing between the platform and the track while a train was passing. Evans v. Sabine & E. T. R. Co. (Tex.) 18 S. W. 493.

And where a lessee of a railroad under a valid lease fills in a trestle, making a high embankment so near the lands of an abutting owner that, in times of rains and melting snow, sand and earth are washed down and flow upon such abutting land, causing damage thereto, the lessor

is not liable therefor though it originally constructed the trestle and was chargeable under the lease with the cost of the embankment. Miller v. New York, L. & W. R. Co. 125 N. Y. 118.

And a railroad company owning a line of railway, which constructs a bridge thereon of sufficient height to permit of its operation with ordinary cars in the usual way, and leases the same, is not liable to an employee of the lessee who is injured while in the discharge of his duties in the ordinary way, by reason of his employer receiving into its train a car of peculiar construction and unusual height, and failing to give notice thereof to the trainmen. Texas & P. R. Co. v. Moore, 8 Tex. Civ. App. 289.

But raising the track of a railroad to such an extent as to cause an overflow of water upon adjacent premises, and throwing dirt upon such premises, or requiring a retaining wall to be built to prevent ground from the railroad from sliding down upon adjacent lands, is in the nature of a nuisance for which all persons are liable who create or continue the same; and where a change of grade is made by a railroad company while operating its road, and it afterwards leases it to another company which raises the grade still higher, they are jointly liable for permanent injuries to property thereby caused, and such liability is not limited to the injury after the lease, where in its nature it could not be separated from that accruing before it, though as to injury resulting from the raised track before the lease the lessor alone would be liable. Little Miami R. Co. v. Hambleton, 40 Ohio St. 496.

So, a railroad company is liable after notice to abate, for damages resulting from the continuance upon its right of way of a nuisance placed there by a former company of the same name while it had possession under a lease from the state, and the fact that the nuisance in question was created in an effort to abate another nuisance causing similar damages of which complaint had been made is of no effect. Western & A. R. Co. v. Cox, 93 Ga. 561.

And a town which has been obliged to pay damages to a person injured by a nuisance maintained upon a railroad where the railroad ran along a highway may look for its indemnity to the railroad company which originally altered the highway, thus creating the nuisance, though the injury occurred after that company had leased its road to

another company and while the lessees were operating it under a contract devolving upon them, as between themselves and the first company, the duties and obligations of the first company. Hamden v. New Haven & N. Co. 27 Conn. 165.

So, a chartered railroad company permitting another company to run trains over its railroad and thus to use its franchise is liable to a passenger upon one of such trains for a personal injury sustained by him by reason of a derailment resulting from negligence in failing to have and maintain a safe track. Central R. & Bkg. Co. v. Phinazee, 93 Ga. 488.

And the lessor of a railroad which is leased under statutory authority containing no provision exempting the lessor from liability remains liable for an injury resulting from defective appliances furnished by the operating company. Lee v. Southern P. R. Co. 116 Cal. 97, 38 L. R. A. 71.

And a railroad company whose railroad is connected with another road by means of a switch is liable for an injury sustained by a passenger in its cars due to careless management of the switch, it being a part of its road over which it must necessarily carry all its passengers, although it was provided for and attended by a servant of the other road at the latter's expense. McElroy v. Nashua & L. R. Corp. 4 Cush. 400, 50 Am. Dec. 794.

And a depot company which constructs a railroad track under a contract by which it is to be used as terminal facilities for another road, the grounds and tracks to be used by different roads, cannot by its lease or a transfer of its franchises rid itself of its liability for the improper use of such road, and a person injured thereon is entitled to recover from the depot company, and of the lessee railroad company acting under such agreement, the damage sustained. A. Backus Jr. & Sons v. Detroit W. Transit & Junction R. Co. 71 Mich. 645.

So, a railroad company cannot devest itself of responsibility for injuries resulting from an omission to construct and place sufficient cattle guards upon its tracks before it uses them or permits anyone else to use them, and it remains responsible though the injury is caused by the trains of the lessee. St. Louis, W. & W. R. Co. v. Curl, 28 Kan. 622.

And legislative consent to the leasing of a railroad under

Mo. Rev. Stat. section 790, which will release the lessor from liability for negligence of the lessee, will not release it from liability for its own negligence; and where it permits salt to remain upon its tracks, which attracts stock upon the track, where it is killed, it will be held liable. Brown v. Hannibal & St. J. R. Co. 27 Mo. App. 394.

In the above case, Main v. Hannibal & St. J. R. Co. 18 Mo. App. 388, *supra*, II. d, 2, was distinguished upon the ground that in that case the effort was to make the lessor liable for the negligence of the lessee.

And in Richardson v. Great Eastern R. Co. L. R. 10 C. P. 486, 33 L. T. N. S. 248, which was an action against a railway company for negligence in allowing a defective truck to be used on its line, causing a collision with a passenger train, in consequence of which a passenger sustained an injury, the truck in question belonging to a wagon company whose duty it was to keep it in repair, it was held that although it might not have been the duty of the railroad company itself to cause the truck to be properly examined and prepared previous to its breakdown, it was somebody's duty to do it, and the railroad company was guilty of culpable negligence in not satisfying itself that a proper examination had taken place before it allowed it to proceed. But this was reversed in L. R. 1 C. P. Div. 342, 24 Week. Rep. 907, upon the ground that there must be some limit to the amount of examination required.

So, while a lessor railroad company is not liable for the mere neglect of its lessee in running its trains causing temporary injury, where the construction and operation of the the road are an invasion of, or an appropriation of, a right of property without the owner's consent, he has a clear right to recover damages by way of compensation for the unlawful appropriation. Stickley v. Chesapeake & O. R. Co. 93 Ky. 323.

And a railroad company which enters upon and appropriates the land of another to its own use without right cannot transfer its corporate privileges to another so as to justify a continuance of the wrong by the vendee or lessee as if the latter were an innocent purchaser. *Ibid.*

But a failure of the lessee of a railroad to run cars for the transportation of freight and passengers over a portion of the road must not only be an intentional, but a wilful, viola-

tion of the charter in order to render the violator amenable to a proceeding in quo warranto for the purpose of depriving the owner of its charter rights. Atty. Gen. v. Erie & K. R. Co. 55 Mich. 15.

III. *Under running privileges or arrangements.*

The same principles seem to govern the liablity of the owner of a railroad for injuries thereon by a company or person having running privileges or arrangements over its road as apply in case of leases of railroads, and something of the same conflict is found among the cases.

Thus, the rule has been laid down that a railroad company holding the franchise and exclusive right to operate a railroad must so use it as not to endanger passengers or property whether the use be by itself or others whom it may permit to use the road, and if it permits another company to run its trains on and over its track, and injuries grow out of the negligent use of the road thus authorized, the company owning the road and franchises will be liable therefor. Peoria & R. I. R. Co. v. Lane, 83 Ill. 448.

And that a railroad company permitting another railroad company to use its track in running its own trains over the consenting company's road, and thus exercising the franchises of the latter, remains liable for the consequences of mismanagement to the same extent as it would be for such mismanagement of its own servants in running its own trains. Sellars v. Richmond & D. R. Co. 94 N. C. 654; Aycock v. Raleigh & A. Air Line R. Co. 89 N. C. 321; Macon & A. R. Co. v. Mayes, 49 Ga. 355, 15 Am. Rep. 678.

And that a railway company furnishing a track for other companies to run cars upon is responsible for the negligence of both or either of the other companies, as well as its own. Chicago & E. R. Co. v. Meech, 59 Ill. App. 69.

Within this rule, a railroad company cannot escape liability for injuries occasioned by arrangements with other roads to which it assents, by which the safety of passengers is jeopardized, and an arrangement between several companies, by which all are to use the same track, will not relieve the owner of the track from responsibility for an injury done by one of the other companies to a passenger, though a tribunal consisting of the directors of all the

roads had been established for the joint management. Eaton v. Boston & L. R. Co. 11 Allen, 500, 87 Am. Dec. 730.

And a railroad company owning a railroad upon which animals are killed in its operation is not relieved from liability therefor by the fact that the killing was directly caused by an engine operated thereon by another railroad company with its consent or permission, and that such injury was not caused by the wilful acts of the servants of the owner. Toledo, P. & W. R. Co. v. Rumbold, 40 Ill. 143.

And a railroad company over whose road another company has a running privilege authorized by statute to be paid for by part of the traffic receipts is liable to a passenger on a train of the latter company on the road of the former company for an injury caused by the negligence of a porter at a platform devoted exclusively to the traffic of the licensee company. Self v. London, B. & S. C. R. Co. 42 L. T. N. S. 173, 44 J. P. 344.

So, a railroad company which allows the trains of another chartered company to use its depot and run over a short section of its track for the purpose of approaching and leaving the depot must protect its own passengers, who are themselves not out of place, against injury from the trains of such other company. Central R. & Bkg. Co. v. Perry, 58 Ga. 461.

And where a mortgage is made upon a railroad and the mortgagees take possession under it for breach of condition, they stand in the place of the corporation, and are vested with its rights and subject to the liabilities incidental to the exercise of the franchise and the operation of the road; and where they permit another corporation to run an engine upon such road they are liable for damages by fire from such engine to the same extent as the corporation itself would have been if no mortgage had been made. Daniels v. Hart, 118 Mass. 543.

And the owner of a railroad over which by license or permission another company runs an engine belonging to itself without being an assignee or lessee of the former company is liable for a cow killed by such engine, where the injury occurred, not from any negligence in running it, but in consequence of the omission to inclose the road with a lawful fence to prevent animals from going thereon. Kansas City, Ft. S. & G. R. Co. v. Ewing, 23 Kan. 273.

And a railroad company is liable for injuries from fire thrown by a locomotive of another company which it per-

mitted to be run on its road without any spark arrester, where its defective condition was known to the train despatcher of the owner of the road, who exercised no supervision over it. Delaware, L. & W. R. Co. v. Salmon, 39 N. J. L. 299, 23 Am. Rep. 214.

Nor does the fact that the lease of a railroad provided that the officers of the lessee should prescribe the rules for and direct the running of the trains in any way change the character and effect of a contract between the companies to the effect that they should operate the road jointly and have equal rights thereon, and that each company should pay and settle all claims for injuries committed by its trains and servants in the management of the railroad, including damages for the killing of stock. Wabash R. Co. v. Williamson, 3 Ind. App. 190.

And where a railroad company owns a road upon which it was running a car in which a passenger was killed by a collision, it is liable for such death, although the collision was caused by the fault of persons in charge of another train run by its permission by another company on the same road. Illinois C. R. Co. v. Barron, 5 Wall. 90, 18 L. ed. 591.

And a transit company with which a railroad company has an arrangement for the hauling of its cars over a bridge and through a tunnel to its final destination, the transit company furnishing the motive power, is the agent of the railroad company so as to render the railroad company responsible for an injury to a passenger who held a ticket to its final destination, though the injury was caused by the negligence or unskillfulness of the transit company furnishing such motive power. Keep v. Indianapolis & St. L. R. Co. 10 Fed. Rep. 454.

Where one has received an injury at the hands of two or more wrongdoers, all, however numerous, are severally liable to him for the full amount of the damage occasioned by such injury, and he has an option to sue all jointly or bring his separate action against each; and where a passenger on a railway train receives an injury through the mutual negligence of the servants of the company on whose train he is traveling, and those of another company using the same road, from a collision between the trains of the two companies, an action may be brought against either company, and the person injured is not restricted to an action against

the company on whose train he travels. Wabash, St. L. & P. R. Co. v. Shacklet, 105 Ill. 364, 44 Am. Rep. 791.

It has been held, however, that a railroad company by giving permission to another railroad company to use a part of its track does not thereby bind itself to make its track safe or to put it in repair, or to make any change in its existing state, and does not place itself under any duty to the passengers of the other company, the claim of such passengers for injury being upon the company with whom they contract. Murch v. Concord R. Corp. 29 N. H. 9, 61 Am. Dec. 631.

And the rule has been laid down, upon the other hand, that where a railroad company allows the trains of another company to use its depot and run over a section of its track for the purpose of approaching and leaving the depot, and a passenger is injured by reason of his own want of promptitude in boarding a train of the licensee company, whose passenger he is, the licensor company is not liable for any negligence which is exclusively the negligence of the other company. Central R. & Bkg. Co. v. Perry, 58 Ga. 461.

So, where one company by agreement or otherwise has a right to run its trains over the roads of another company, the servants of the former company may maintain an action against the company owning the road for an injury occasioned by the improper and negligent management of a switch which it was the duty of the latter company to keep in the proper place. *Re* Merrill, 54 Vt. 200; Sawyer v. Rutland & B. R. Co. 27 Vt. 370.

And where a company owning a railroad track gives to another company permission to run its cars over it, in the absence of any legal arrangement varying the rule, the owner must be held to the exercise of ordinary care in the construction and maintenance of bridges along the track for the protection of the servants of the leasing company, as well as its own. Texas & P. R. Co. v. Moore, 8 Tex. Civ. App. 289.

And a person in the general employment of a railroad company, his duty being to attend to the switches and couple and uncouple its cars together with those of another company at a station where they use a common track, whose wages are paid by both companies though he receives them from the former, who is injured while coupling cars for the latter, is the latter's servant so as to be able to maintain an

action against it for such injuries if caused by its negligence. Vary v. Burlington, C. R. & M. R. Co. 42 Iowa, 246.

But where two or more charter railway companies whose lines terminate at the same point use in common a track belonging to one of them, the owner thereof is not responsible to its employees for personal injuries sustained solely by reason of the negligent use of the track by the employees of another company, the redress being, in such case, against the company whose employees are in fault. Georgia R. & Bkg. Co. v. Friddell, 79 Ga. 489.

In the above case, Coggin v. Central R. Co. 62 Ga. 685, 35 Am. Rep. 132, *infra*, IV., was distinguished upon the ground that in that case the negligence was by an employee of the proprietary company, and the injury was to the employee of a telegraph company; and Macon & A. R. Co. v. Mayes, 49 Ga. 355, 15 Am. Rep. 678, *supra*, was distinguished upon the ground that in that case the negligent company was using the franchise as well as the track of the proprietary company; and Central R. & Bkg. Co. v. Perry, 58 Ga. 461, *supra*, was distinguished upon the ground that in that case the injury was to a passenger.

So, there is no variance in an action for a personal injury, between an allegation that the defendant was in use of the road on which the injury occurred, and that the person having charge of the switch was in its employment and under its direction and control, and proof that under an agreement with the defendant company another company was permitted to run its trains upon such road, and that while the plaintiff was conducting a train over the road the engine and cars were diverted from the track by the negligence of the defendant's servants placed in charge of the switch which caused the injury complained of, the object of the averment being to show that the plaintiff was lawfully on the road at the time of the injury. Sawyer v. Rutland & B. R. Co. 27 Vt. 370.

Under the Iowa statute, where a railroad company has the privilege of running its trains over the tracks of another company and an injury is caused by the operation of the road, the company which causes the injury is the party liable to respond in damages therefor without reference to which owned and constructed the road. Clary v. Iowa Midland R. Co. 37 Iowa, 344; Stephens v. Davenport & St. P. R. Co. 36 Iowa, 327.

IV. *Under contracts for construction or otherwise.*

A railroad company which permits a construction company to exercise its franchise of running cars over its road is liable for any injury done, to the same extent as though it itself had run such cars. Chattanooga, R. & C. R. Co. v. Liddell, 85 Ga. 482; Chicago & R. I. R. Co. v. Whipple, 22 Ill. 105.

The principle of law releasing an owner from liability for acts performed by an independent contractor has no application where an injury is sustained from a neglect of duty created by law, which duty exists irrespective of any contract, or where the contract is merely introductory. Sawyer v. Rutland & B. R. Co. 27 Vt. 370.

And where a railroad company enters into a contract with another railroad company to build and construct its road, and such other company operates and runs trains over the road so far as it has been constructed for purposes of general traffic, the owner is responsible for torts committed by it in the operation of its trains thereon, whether it was allowed the privilege of using such road, or the privilege of operating it arose out of some consideration of the contract to build and construct. Lakin v. Willamette Valley & C. R. Co. 13 Or. 436, 57 Am. Rep. 25.

In the above case, Cunningham v. International R. Co. 51 Tex. 503, 32 Am. Rep. 632, *infra*, was distinguished upon the ground that there the trains under the contract of the contractor were not being used for the purpose of traffic, but for the purpose of construction, when the injury occured.

So, a railroad company which contracts with an individual to move its cars to the various consignees by horse power and bring them back empty to the yard, the contractor employing the teams and men and exercising an independent control over them, is not thereby relieved from responsibility for the negligent acts of such contractor in the moving of such cars, whereby a person is hurt. Philadelphia, W. & B. R. Co. v. Hahn (Pa.) 12 Atl. 479.

And the fact that an engine killing stock was in use for traffic at the time under an agreement, instead of being employed in construction of the road under a contract therefor with the owner of the road, will not affect the position of the contractor as an agent for the owner, or the liability of the owner for the damage. Bay City & E. S. R. Co. v. Austin, 21 Mich. 390.

And a railroad company on whose track a person was injured by the negligent management of a car cannot relieve itself from liability therefor upon the ground that the car was not being operated by it but by a construction company with which it had a contract for an electrical equipment of its railroad, where the car in question was a passenger car which was being operated for profit. Cogswell v. West Street & N. E. Electric R. Co. 5 Wash. 46.

In the above case Cunningham v. International R. Co. 51 Tex. 503, 32 Am. Rep. 632, *infra*, was distinguished upon the ground that in that case the passenger was carried by a construction train operated by independent contractors for the building of the road, without the knowledge of the railroad company and against its express prohibition.

So, one who makes a contract by which he is to take entire charge of the freight business of a railroad company at a station, loading and unloading the cars, handling them, and making up the trains, and doing all other yard service necessary to the transaction of the freight business, and having control over the grounds, yards, buildings, engines, and cars at that station, for which he is to be paid at a designated rate per ton for freight received or delivered and per car hauled, the business to be done under the railroad company's superintendent and to his satisfaction, stands in the relation of a servant to the railroad company so as to render the company liable for his acts, and not in the relation of an independent contractor. Speed v. Atlantic & P. R. Co. 71 Mo. 303.

And a railroad engineer in the employ of the owner of the road remains its servant while in its pay and liable to be discharged by it, though he is temporarily subjected to the orders of a telegraph company while engaged solely in transporting materials for such telegraph company with a force of attendants employed by it, and will be required to observe the general law of diligence applicable to his vocation except as to acts and omissions dictated by express orders, and his failure to do so will be negligence imputable to the railroad company, which will be liable for a personal injury resulting therefrom to one of the force of attendants employed by the telegraph company. Coggin v. Central R. Co. 62 Ga. 685, 35 Am. Rep. 132.

But as between a railroad company and the servant of a telegraph company which was under contract with the

railroad company by which the railroad company was to transport the materials used and men engaged in the construction and repair of a telegraph line, such servant of the telegraph company will be deemed to have taken all risks whatsoever not occasioned by negligence imputable to the railroad company, but none that arose from such negligence. *Ibid.*

And in establishing the liability of the owner of a railroad for damages caused in its operation, the question whether the parties doing the damage were running the train over the railroad under contract with it or by its permsssion and consent is immaterial. Pennsylvania Co. v. Ellett, 132 Ill. 654.

In City & Suburban R. Co. v. Moores, 80 Md. 348, however, it was held that the mere fact that a railroad company owned the track on which an engine was being run in performance of a contract would not make it liable for injuries caused by such engine, as it would not be connected with the act causing the injury; but this seems to be a case of an independent contractor rather than of a lessee.

And the fact that a railroad company has leased its line, and that a person was injured thereon by the negligent operation of its trains, does not render the railroad company liable for such injury, where the person injured was not in the employ of either the lessor or lessee, but was working for an independent contractor who was building a fence for the lessor for a certain sum per mile. Galveston, H. & S. A. R. Co. v. Garteiser, 9 Tex. Civ. App. 456.

So, where a shipper by consent of a railroad company undertakes with the help of his own employees alone to run cars down a grade to the place where they are intended for loading, and while so employed one of such employees is injured by the negligence of his co-employees, the railroad company is not liable to an action for damages on account of such injuries. Hanna v. Chattanooga & N. R. Co. 88 Tenn. 313, 6 L. R. A. 727.

And a railroad company is not liable in damages for alleged negligent management of one of its trains used and controlled by an independent contractor for construction purposes on a portion of the road built under the construction contract and not yet surrendered to the company. Cunningham v. International R. Co. 51 Tex. 503, 32 Am. Rep. 632.

And a railroad company whose road was in the possession of an improvement company having authority under its incorporation to construct and equip the road will not be held responsible for wrongful acts or omissions of the employees of such improvement company because it ran trains and carried passengers and freight where the road was not leased to be operated for general traffic, and the charge was not based upon the theory that the improvement company was operating the road in its own name for the use and benefit of the railroad company merely to relieve the latter from responsibility. Kansas C. R. Co. v. Fitzsimmons, 18 Kan. 34.

See also Huey v. Indianapolis & V. R. Co. 45 Ind. 320, *supra*, VIII.

V. *Under ineffectual attempt to consolidate.*

A railroad company is liable for injury sustained by a person through the negligence of persons operating its road under an attempted consolidation which was illegal and ineffectual. Latham v. Boston, H. T. & W. R. Co. 38 Hun. 265.

VI. *Occupation must be authorized.*

The rule that a railroad company permitting another company to use its track remains liable for the consequences of mismanagement in such use to the same extent as though its own agents and servants were using it does not apply to a case in which the owner of the railroad allowed another company to use its track for a short distance to get to a station, and some cars of the road became detached from a train and ran in on the licensor's road, in consequence of which an accident occurred, such cars running at random, and being under no control, and the accident happening at a place where the licensee company had no authority or license to go, even in a lawful manner. Sellars v. Richmond & D. R. Co. 94 N. C. 654.

In cases of injury inflicted by the lessee of a railway, however, no other negligence need be alleged or proved to fix the liability of the owner than that of the company or corporation permitted or authorized by the owner to use the railroad. *Ibid.*

But an allegation in an action against the lessor of a

railroad for damages caused by its operation, that such lessor was a corporation owning and using the railroad tracks in question on which the defendant and other railroads ran their cars, the defendant having control and occupation of the tracks, is not subject to objection on a motion in arrest of judgment; as, for aught that appears, the company by which the damage was done might have been a trespasser upon the defendant's road. Pennsylvania Co. v. Ellett, 132 Ill. 654.

See also East Line & R. River R. Co. v. Culberson, 72 Tex. 375, 3 L. R. A. 567, *supra.*

VII. *Injuries to employees.*

The same principle seems to have been adopted where the injury is to an employee of one of the companies as when it is to a third person.

Thus, a railroad company by accepting its charter assumes the obligation to keep its tracks in safe condition for the operation of its trains over them, and this duty is due to all persons who are permitted by it to travel upon or operate trains over it, including employees of a lessee. Galveston, H. & S. A. R. Co. v. Daniels, 9 Tex. Civ. App. 253.

And the lessor of a railroad is liable to an employee of its lessee who is injured by the imperfect construction and maintenance of the rails and tracks. Lee v. Southern P. R. Co. 116 Cal. 97, 38 L. R. A. 71.

And a railroad company which has leased its road is liable for an injury to a person caused by a defective side track belonging to it, although at the time of the accident he was acting as a brakeman of the lessee company on a train operated by it. Trinity & S. R. Co. v. Lane, 79 Tex. 643.

So, a railroad company over a section of whose track another company had a contract for the running of its trains is liable in tort to the latter's brakeman, who without the fault of himself or his co-employees receives a personal injury while in the performance of his duty on his employer's train, solely by reason of the negligent construction of the former's depot. Nugent v. Boston, C. & M. R. Co. 80 Me. 62.

Agreements between several railroad companies having connecting lines of railroads have no effect upon the rights of strangers to the agreement, and do not make the em-

ployees of one company the co-employees of the employees of the other so as to bar a recovery by an employee of the one for an injury arising from the negligence of an employee of the other. Philadelphia, W. & B. R. Co. v. State, Bitzer, 58 Md. 372.

The rule that every employee assumes the risk of the negligence of his co-employees does not apply in case of an injury to an employee of a railroad company occurring on the road of another railroad company upon which it had running arrangements, caused by the imperfect condition of the road. *Ibid.*

And the fact that a trainman and switchman by whose negligence the trainman was injured were both under the exclusive control of the railroad company owning the road does not make them fellow servants so as to relieve the company from liability for the injury where the switchman was in the employ of the company and the trainman was in the employment of another company having the right to use the track of the former company for the purpose of transporting coal thereon, under an arrangement that the track should be kept in running order by the owner, the business of each company being entirely separate. Tierney v. Syracuse, B. & N. Y. R. Co. 85 Hun, 146.

And the owner of a railroad yard and tracks, though it has rented them and given complete possession and control thereof to the receiver of another railroad company in consideration of a stipulated rental and an undertaking by the company to do certain switching, is not relieved thereby from its duty to keep the tracks in a safe condition. And in case of a negligent failure on its part to do so a breach of the duty which it owes the lessee company and its employees is committed, which will render it liable to the widow of an employee who lost his life as a result of such negligence. Rome R. Co. v. Thompson, 101 Ga. 26.

So, a variance between an averment in an action against a railway company for negligence that the plaintiff was an employee of the railroad company and proof that he was employed by its lessee and injured through the lessor's negligent construction of the road is immaterial. Lee v. Southern P. R. Co. 116 Cal. 97, 38 L. R. A. 71.

And proof in an action for personal injury that the person injured was in the employment of and acting for another corporation which was operating the railroad under a lease is admissible therein under a general denial. Baxter v.

New York, T. & M. R. Co. (Tex. Civ. App.) 22 S. W. 1002.

And in Wabash, St. L. & P. R. Co. v. Peyton, 106 Ill. 534, 46 Am. Rep. 705, which was an action for a personal injury to a third person caused by the negligent act of the yard master of the lessor which was brought against the lessee, the court declined to say whether the lessor was also liable, but said that if it was, the person injured would have her option to sue either.

But a company owning a railroad is not liable to the servant of a company using it, in the absence of a special agreement, for any injury caused by the negligence of the latter company or of its servants. Texas & P. R. Co. v. Moore, 8 Tex. Civ. App. 289.

And an employee of a railroad company who in his contract of employment assumed all risk incident to his employment cannot claim that he was injured on the road of another company for the purpose of avoiding his agreement, and at the same time seek to make his employer liable for the injury. Galloway v. Western & A. R. Co. 57 Ga. 512.

An instruction in an action by an employee of the lessee of a railroad for an injury caused by its negligent operation, that if the owner and lessee were under a joint duty to keep the track in repair the plaintiff could not recover, is not erroneous as against the railroad company. Rome R. Co. v. Thompson, 101 Ga. 26.

And an engineer in the employ of the owner of a railroad, who receives an injury from a collision with a train of another company using a part of the road under a lease from the owner through the negligence of the lessee, cannot recover damages from the owner of the road, as the negligence of the employees of the lessee is not one of the hazards against which it must be presumed he contracted. Clark v. Chicago, B. & Q. R. Co. 92 Ill. 43.

So, a railroad company is not bound to answer in damages for injuries alleged to have been caused by a co-employee, where the person injured was a track hand and servant of an individual lessee on the road, and not of the railroad company itself, and the injury was caused by one likewise in the service of the individual lessee. Jones v. Georgia Southern R. Co. 66 Ga. 558.

And a railroad company is not liable for an injury received on its road by a brakeman in the service of another railroad company, where it was caused by the negligence of his fellow servant on a train owned and operated by their

employer. Baltimore & O. & C. R. Co. v. Paul, 143 Ind. 23, 28 L. R. A. 216.

In the above case Macon & A. R. Co. v. Mayes, 49 Ga. 355, 15 Am. Rep. 678, *supra*, III., was distinguished upon the ground that there the president of the railroad company was also a member of a construction company engaged in constructing the road and having possession and running its trains thereon for that purpose, and that at the time of the injury the person injured was acting under his special directions, and was therefore a servant of the company.

So, a servant or employee of a railroad company operating a road belonging to another company without authority cannot recover of the owner damages for personal injuries resulting to him in the course of his employment through the negligence of his employer or of its officers or agents. East Line & R. River R. Co. v. Culberson, 72 Tex. 375, 3 L. R. A. 567.

The duty owing from the lessee of a railroad to its employees is one which arises wholly from contract, and is not imposed by the charter of incorporation of the railroad, and the lessor company is not obliged to employ as a servant any particular members of the public, and a person entering the services of the lessee company therefore acquires no right against the lessor, except by virtue of the terms of the employment, and cannot recover of the lessor for injuries sustained by the negligence of the lessee in the operation of the road, his sole remedy being against the lessee. Hukill v. Maysville & B. S. R. Co. 72 Fed. Rep. 745.

And the provisions against leasing a franchise so as to relieve it or property held under it from liability of the lessor or grantor, lessee or grantee, made by Cal. Const. art. 12, section 10, does not give an employee of the lessee of a railroad a right of action against the lessor company upon the conviction that it is his employer, but merely enables him to enforce his judgment based on the negligence of his employer against the property. Lee v. Southern P. R. Co. 116 Cal. 97, 38 L. R. A. 71.

As to injuries to employees, see also Vary v. Burlington, C. R. & M. R. Co. 42 Iowa, 246; Georgia R. & Bkg. Co. v. Friddell, 79 Ga. 489; Sawyer v. Rutland & B. R. Co. 27 Vt. 370; *Re* Merrill, 54 Vt. 200; Texas & P. R. Co. v Moore, 8 Tex. Civ. App. 289, *supra*, III., and Coggin v. Central R. Co., 62 Ga. 685; Hanna v. Chattanooga & N. R. Co. 88 Tenn. 313, 6 L. R. A. 727, *supra*, IV.

VIII. *Provisions for joint liability.*

The owner of a railroad is liable, under Ind. Sess. Laws, 1863, p. 24, providing that the lessee of a railroad shall be jointly and severally liable with the lessor for injuries to stock thereon occasioned by trains of the lessee when such lessee uses the road in the corporate name of the company which owns it, where animals are killed by the trains of another corporation running in its own name and in its own behalf and under its control, over a part of the track of the owner under a contract for that purpose between the two corporations. Indianapolis & M. R. Co. v. Solomon, 23 Ind. 534.

And Ind. act March 4, 1863 (3 Ind. Stat. 413), making the company owning a railroad jointly and severally liable with the lessees and assignees, receivers and other persons running or controlling it for stock killed or injured, includes contractors, and it is no defense in an action to recover for stock killed that the injury was done by the train of another company which was in the exclusive use and protection of contractors for the construction of the road, who had not completed the same. Huey v. Indianapolis & V. R. Co. 45 Ind. 320.

And 3 Ind. Stat. 413, section 1, providing that lessees, assignees, receivers, and other persons running or controlling any railroad in the corporate name of such company shall be liable jointly and severally with such company for stock killed or injured by the locomotives, cars, or other carriages of such company, renders the company owning the road liable without reference to the company or person who may have been running the locomotives, cars, etc., and such company may be sued alone. Fort Wayne, M. & C. R. Co. v. Hinebaugh, 43 Ind. 354.

But a railroad whose road is operated by a lessee is not liable for stock killed or injured under Ind. act March 4, 1863, providing that when a road is run or controlled by a lessee thereof in the corporate name of the owner, the lessees should be liable jointly and severally with such owner, where the lessee leased it in his own name. Pittsburgh, C. & St. L. R. Co. v. Bolner, 57 Ind. 572; Pittsburgh C. & St. L. R. Co. v. Hannon, 60 Ind. 417; Pittsburgh C. & St. L. R. Co. v. Currant, 61 Ind. 38.

And under the Indiana statute an animal killed or injured by a railroad train run by a lessee must have been struck

by some part of the train by which it is claimed that it was killed or injured, to render the lessor and lessee jointly liable for its value. And where the evidence shows that two animals were tied together, and one was struck and killed and the other one injured by being dragged, the owner of the animal is not entitled to recover in a joint action for the animal which was not struck. Jeffersonville, M. & I. R. Co. v. Downey, 61 Ind. 287.

And in order to make a railroad company by whose train stock is killed jointly and severally responsible therefor with the owner of the road, under 3 Ind. Stat. 413, section 1, it must have been running or controlling the road of that company in the corporate name of such company either as lessee, receiver, or otherwise, and where the complaint in an action for such injury contains no allegation to that effect, it shows no cause of action against the lessee. Cincinnati & M. R. Co. v. Townsend, 39 Ind. 38; Cincinnati & M. R. Co. v. Paskins, 36 Ind. 380.

So, a complaint in an action for killing or injuring stock under Ind. act March 4, 1863, providing that assignees, receivers, and other persons running or controlling any railroad in the corporate name of such company shall be liable jointly and severally with such company, for stock killed or injured by the locomotives, cars, or other carriages of such company, is insufficient where it fails to show that the railroad company by its agents and employees had anything whatever to do with the killing of the stock, or that the locomotive doing it belonged to such company. Pittsburg, C. & St. L. R. Co. v. Hannon, 60 Ind. 417.

And a complaint in a joint action under the Indiana statute against one railroad company as the owner and another as the lessee of a railroad, to recover for stock alleged to have been killed by the cars of the latter on such road, must, to be sufficient as to the lessee, allege that the lessee was running such railroad in the name of the owner. Jeffersonville, M. & I. R. Co. v. Downey, 61 Ind. 287.

In the above case, Indianapolis, C. & L. R. Co. v. Warner, 35 Ind. 515, *infra*, was distinguished upon the ground that in that case the complaint did not show the relation of the two companies.

And evidence that at the time of an injury to stock the railroad upon which it was injured was being run by a lessee in its own name, is admissible in an action against the railroad company for damages for such injury com-

menced before a justice of the peace. Pittsburgh, C. & St. L. R. Co. v. Bolner, 57 Ind. 572.

So, in North Carolina a railroad company leasing its road is answerable jointly with the lessee company operating the road for injuries due to the negligence of the latter. Tillett v. Norfolk & W. R. Co. 118 N. C. 1031.

And Ohio Rev. Stat. section 3305, declaring that notwithstanding a lease to a foreign corporation by a railroad company of the state, the lessor shall remain liable as if it operated the road itself, and both the lessor and the lessee shall be jointly liable upon all rights of action accruing to any person for any negligence or default growing out of the operation and maintenance of such road, applies to leases previously made as well as to those to be made in the future, and is not unconstitutional as impairing rights under the contract of lease. Fisher v. Baltimore & O. & C. O. R. Cos. 3 Ohio N. P. 283.

IX. *Effect of lease or other contract upon failure of duty to fence.*

The duty to fence a railroad right of way is largely, if not entirely, a statutory one, and under most of the statutes it is deemed to rest with the owner of the road, and any liability arising from a failure to perform such duty rests upon such owner.

Thus, if a railroad company either owns or operates a railroad it is liable for live stock killed unless its track is fenced, under the Washington statute, and the owner of the road is liable as such, though it had previously leased it to some other company. Oregon R. & Nav. Co. v. Dacres, 1 Wash. 195; Whitney v. Atlantic & St. L. R. Co. 44 Me. 362, 69 Am. Dec. 103.

And the owner of a railroad under a charter requiring it in general terms to fence its road upon both sides where a fence may be requisite is liable to a person whose cow is killed through neglect to fence the road, though the road was being run by another company under a long lease. Nelson v. Vermont & C. R. Co. 26 Vt. 717, 62 Am. Dec. 614.

And a railroad company operating the road of another company under a contract for its construction is the agent of the owner so that such owner will be liable for its negligent acts, within the meaning of Mich. Laws 1867, section 43, imposing the duty to maintain fences along the line of the road upon the owners and occupants respectively. Bay City & E. S. R. Co. v. Austin, 21 Mich. 390.

So, a railroad company leasing its road may be held responsible for damages caused by a defective or broken-down fence while the road was being operated by another, though the evidence was sufficient to authorize a finding that a lease existed. Price v. Barnard, 65 Mo. App. 649.

And the duty of a railroad company to keep its right of way fenced devolves under the California statute providing that it shall be the duty of the railroad company to make and maintain a good and sufficient fence, and that it shall be liable for stock killed in case of its failure to do so, upon the owner of the road, and such owner cannot relieve itself from liability for cattle killed because of a failure to maintain a proper fence, by pleading that it had leased the road, and that the cattle were killed by the trains of the lessee. Fontaine v. Southern P. R. Co. 54 Cal. 645.

And the fact that a railroad was incomplete, and that the railroad company permitted a contractor to run a construction train over it, will not absolve the company from liability for the killing of a cow by such construction train, though it was operated and controlled by the contractor, where the road was not inclosed by a lawful fence in accordance with the statute, casting the liability upon the company for cattle killed or injured by the engine or cars on its railway. Wichita & C. R. Co. v. Gibbs, 47 Kan. 274.

And in Missouri P. R. Co. v. Morrow, 32 Kan. 217, it was said to be always the duty of a railroad company operating a railroad to see that proper cattle guards exist wherever its railroad enters or leaves improved or fenced land, whether such railway company owns the railroad or is simply operating it under a lease; but this was an action brought against the lessee.

So, a railroad company owning a road will be held responsible to third persons under the Illinois statute requiring railroads to fence their roads, for such damages as are incurred, where it operates its road itself or allows others to do so without fencing the track, either the lessee or the lessor company being liable in such case. East St. Louis & C. R. Co. v. Gerber, 82 Ill. 632.

And a railroad company owning a road is liable under the Illinois statute requiring railroad companies to fence their tracks within six months after the road has been opened for use, if they fail to fence the track thereof within six months after they begin to run trains on it, though for construction purposes, and the fact that the road remains under

the control of the contractors does not affect the liability. Rockford, R. I. & St. L. R. Co. v. Heflin, 65 Ill. 367.

And in Illinois C. R. Co. v. Kanouse, 39 Ill. 272, 89 Am. Dec. 307, which was an action against the lessee of a railroad for the killing of a horse due to the fact that the railway land was unfenced, it was said that it was the duty of the owner to fence the road, and that it would have been liable for the injury had it been sued.

So, in Maine a railroad company whose charter requires it to erect and maintain substantial, legal, and sufficient fences on each side of the land taken by it for its road where the same passes through inclosed and improved lands, and in default of which they are liable for injuries occasioned thereby, cannot relieve itself from any liability for loss or injuries to stock from a failure thus to fence the road by the assignment and leasing of the road to another company. Whitney v. Atlantic & St. L. R. Co. 44 Me. 362, 69 Am. Dec. 103.

And a railroad company which permits the running of cars upon its road before it has erected fences as required by law will not be exonerated from liability for damages for the killing of a horse which had strayed on the track by proof that at the time certain persons were operating the road under an agreement with the company that they should receive and retain the earnings, where it was further stipulated that the train should run under the direction and control of the company. Wyman v. Penobscot & K. R. Co. 46 Me. 162.

And in Indiana an action for injury to stock upon a railroad on account of a failure to fence the right of way when regarded as one for tort, or in the nature of a tort when brought against two railroad companies, is sufficiently charged in a complaint alleging that the act was done by defendants without showing what relation they sustained to each other, but a recovery cannot be had against one upon evidence showing its liability, or under the statute against both jointly or severally. Indianapolis, C. & L. R. Co. v. Warner, 35 Ind. 516.

And such a complaint charging that a horse was killed on the road of one of them, where the track was not securely fenced, by the cars of the other passing over the road in charge of the officers of the latter company, is insufficient where it does not show that the owner of the road leased it to the other or had in any way consented to its use thereof.

Cincinnati & M. R. Co. v Townsend, 39 Ind. 38; Cincinnati & M. R. Co. v. Paskins, 36 Ind. 380.

Under Iowa Laws 1862, chap. 169, section 6, providing that any railroad company hereafter running or operating its road and failing to fence it against live stock shall be absolutely liable to the owner of any live stock injured or killed by reason of the want of such fence, and Laws 1868, chap. 79, section 1, providing that all companies, lessees, or corporations running or operating any railroad shall be liable for injuring, destroying, or killing any live stock, where the two railroad companies operate trains upon the same road, one being the owner and the other the lessee, each is liable only for stock injured or killed by its trains by reason of the road being unfenced, and not for that injured or killed by the trains of others. Stephens v. Davenport & St. P. R. Co. 36 Iowa, 327.

The word "agents" in N. Y. Laws 1892, chap. 676, section 32, providing that so long as fences upon the sides of railroad tracks are not made or not in good repair, the company, its lessees, or others in possession shall be liable for all damages done by their agents, has reference only to the agents of the corporation or person operating the road, and does not apply so as to render a lessee operating the road the agent of the lessor which never operated it. Throne v. Lehigh Valley R. Co. 88 Hun, 141.

And a railroad company owning a line of railroad which leased its right of way and all its property real and personal and franchises except the franchise to exist as a corporation, to a foreign corporation for a period of 999 years, having no rolling stock and never operating the road, the engines and cars thereon belonging to the lessee company, is not liable for the negligent killing of stock because of the omission to fence the side of the road, under N. Y. Laws 1892, chap. 676, section 32, requiring every railroad corporation and any lessee or other person in possession before the lines of its road are open for use to erect and maintain fences, and providing that so long as such fences are not made or in good repair the corporation, its lessee or other person, shall be liable for all damages done by its agents, engines, or cars to any domestic animals thereon, as the duty of maintaining such fences was imposed upon the lessee by N. Y. Laws 1864, chap. 582, section 2. *Ibid.*

So, the conductor of a railroad train belonging to the lessee of a railroad which injures a person through the negli-

gence of the engineer in failing to give a proper warning of the approach of a train to a highway crossing, is not the servant of the lessor of the road so as to render it liable for his negligence under a trackage contract, though it provided that the conductor should be under the control and subject to the orders of the superintendent of the lessor road through courtesy, and such superintendent was allowed to discharge the employees of the lessee road for any dereliction in duty occurring upon the leased road. Cain v. Syracuse, B. & N. Y. R. Co. 20 Misc. 459.

And a statute providing for fences for the protection of cattle and other animals named has no application to fences for the protection of persons traveling on a highway. Ditchett v. Spuyten Duyvil & P. M. R. Co. 67 N. Y. 425.

In the above case it was said that it may well be doubted whether the lessor of a railroad who had parted with the possession could be held liable for the negligence of the lessee under a statute requiring railroad corporations to fence the sides of their roads. *Ibid.*

The foregoing note is taken from Volume 44 L. R. A., pp. 737–757, and is appended to the report of the case of Caruthers vs. *Kansas City, Ft. S. & M. RR. Co.*